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A

TREATISE

OF

Church-lands & Tithes:

In two Parts.

CONTAINING,

An Historical Account of Ecclesiastical Revenues, Churches, Church-yards, Church-offices, Benefices, Glebes, Manses, Patronage, Monachism, Religious, and some Military-orders, with a particular History of Tithes: And a clear and full Discusion of Points of Right and Controversy, relating to these Matters; And shewing how far the SCOTS and Canon Laws do agree, and differ. A distinct Explanation of Actions before the Commissions, concerning Ministers Stipends; Tithes; Erecting or Transplanting Churches; And the Inlarging or Restricting Parishes. And of Actions about Ministers Stipends, Tithes, *&c.* falling under the Cognisance of the Lords of Session.

By WILLIAM FORBES Advocat.

EDINBURGH,

Printed by the Heirs and Successors of *Andrew Anderson*, Printer to the Queens most Excellent Majesty: And to be sold at *John Vallange*'s Shop, on the North-side of the Street, a little above the Cross, *Anno DOM*, M DCC V.

TO

The Right Honourable,

Sir *Hugh Dalrymple*

OF

North-Berwick,

Knight Baronet,

Lord President of the Session, One of Her MAJESTIES *most Honourable* PRIVY COUNCIL, &c.

My LORD,

I Wou'd not be understood by this Dedication so vain, as to think any thing I do of this Nature can be of much Use to You, whom the Nation has a due Veneration for as an Oracle of Law, and Ornament of the Bench; Where You Justly fill a Worthy Father's Chair, and Exercise that Vir-

tue, and thoſe Sublime Parts, which GOD has ſo Liberally beſtowed on You, to good Purpoſe in the Service of Your Queen and Country. All I propoſe, is only to pay my Acknowledgements in this eaſie Way, for the Learned and Uſeful Advice I received from your Lordſhip, in ſome Points handled in this Treatiſe. I'll ſay nothing about my Book to You, who are the beſt Judge of Standard-Law and Senſe, but that its Fate depends upon Your Approbation; Which I preſume will recommend the Performance to the Knowing World, in ſpite of the Weakneſs and Defects of the Author, who ſtudies to approve himſelf with all Sincerity and Affection,

My LORD,

Your Lordſhips moſt Humble, and Devoted Servant,

WILLIAM FORBES.

PREFACE.

AS *in the* Body *of the* Roman Law *there are ſeven* Cruces, *That is, ſo many* Perplexed Laws, *whereof to find out the True and Genuine Meaning,* Interpreters *have rack'd their* Fancies: *So we have two* Subjects *in our* Law *generally not well underſtood, viz.* Bills of Exchange, *and* Eccleſiaſtical Benefices, *conſiſting of the* Temporality *and* Spirituality *of* Church lands *and* Tithes. *I have lately endeavour'd to clear up the former, and the* Favourable Reception *of that* Eſſay *hath incouraged me to try my hand upon the Latter.*

The Reaſon *why ſo few at this day have very diſtinct* Notions *of that* Matter, *doth* Obviouſly *proceed from this, That the* Canon Law, *tho we never burnt it as* Luther *did,* (a) *hath ſince the* Suppreſſion *of* Popery *been little* Studied *in* Scotland: *And ſo the different* Regular *and* Secular Offices *of the* Church *of* Rome, *to which before the* Reformation *particular* Benefices *ſtood annex'd, are turn'd a kind of* Myſtery *to many.*

(a) *At Wittenberg in a Solemn Aſſembly.*

Bene-

Benefices *are* Lands *and* Rents *given to* Eccleſiaſticks *for* Service *to be done to the* Church. *About the* Nature *and* Rights *whereof, a multitude of* Books, *Prolix and Perplex'd enough, are extant: Such as thoſe written by* Rebuff, Bengæus, Garcia, D' Eſpeiſſes, Duaren, Barboſa, Dartis, Corradus, *and others, which for* Brevities *ſake ſhall be* Nameleſs.

Peter Rebuff *a* French *Profeſſor of Law, who flouriſhed at* Paris *in the Sixteenth Century, is the firſt whom I find to have diſtinguiſhed the* Spirituality *from the* Temporality *of* Benefices, *by a formal* Treatiſe *upon* Tithes. *But ſince his time that* Subject *hath been much, tho not well, handled.* Rebuff, H. Caniſius, A. Moneta, *and the* Authors *of the* Parſons Law, Parſons Counſellour, *and* Parſons Guide, *are thoſe I cite moſt frequently. The* Writers *beyond* Sea *do weary us with their needleſs* Caſes *and* Queſtions *about the* Pope's Power *in* Alienating, Impoſing, *and* Diſpenſing *with* Tithes; *The various* Kinds *of 'em; the* Perſons *by, and to whom they ſhould be pay'd; the* Manner *of Payment; what* Things *are ſubject to* Tithing; *and the* Puniſhments *to which the* Not-payer *of* Tithes *is expos'd, whereof* Rebuff *enumerates no fewer than* 36 *Sorts.* Lawyers

do

do ſtrangely vary and fluctuate, as to the Point *of* Preſcription *in* Tithes; *Nor are they more of a Piece or conſiſtent with themſelves, when about to determine the* Subject Tithable. *Which may probably be aſcrib'd to their confounding the* Poſitive, *with the* Negative Preſcription; *And not diſtinguiſhing the* Characteriſtick *of* Parſonage *from that of* Vicarage Tithes.

The Divine Right *of* Tithes *hath long been an* Argument *of* Debate *to* Canoniſts, *School-men,* Proteſtant Divines, *and others: But differently manag'd. The* Generality *of the* Canoniſts, *ſome few excepted, imperiouſly dictate the* Divine Right *of* Tithes *from the* Moral Law, *which is alſo preach'd up by ſome of the* Engliſh Clergy, *and Zealouſly maintain'd by Sir* Henry Spelman. *The* School-men, *and great* Lawyers *not a few, plead that* Maintenance *is due to the* Miniſtry Jure Divino *out of the* Annual Product *of our* Subſtance; *But that the* Quota *of a* Tenth Part *is meerly of* Eccleſiaſtical *and* Human Inſtitution. *Others are not* Poſitive *or* Clear *which of theſe* Opinions *to declare for. Doctor* Forbes (a) *thinks the* Debate *not ſo very* Neceſſary, *ſince the* Divine Right *of* Tithes *might be ſupported*

(a) *Theolog. Moral. Part* 3. *Lib:* 8. *Cap.* 2. *N.* 13.

upon

upon this Foot, *That these being once dedicated to* GOD's Service, *it is* Sacrilege *to convert them to a* Civil Use. *Mr.* Milton (a) *declaims against the* Exaction of Tithes, *with a great deal of* Wit *and* Raillery, *but then gives* too much the Loose *to his* Satyrical Vein, *in* Depretiating *and* Disparaging *the* Clergy; *Whom he would have to* Truckle *and* Depend *for their* Maintenance *upon the* Charity *and* Free-will-offerings *of the* People. John Selden *treats the* Subject *of* Tithes *by way of* History, *discourses with a vast deal of* Learning *about the* Payment of Tithes *by the* Patriarchs, Jews, *and* Gentiles, *the* Maintenance *of the* Church *in the* Primitive Times *of* Christianity, Arbitrary Consecrations, Appropriations, Infeudations *of* Tithes, Exemptions *from them, the* Establishment *of the* Parochial Right, *the* Modern Payment *of* Tithes *in the several* States *of* Europe, *and the various* Opinions *and* Laws *concerning them. That* Great Antiquary *professes, That he design'd not to Impugn the* Divine Right of Tithes: *But at the same time has many shrewd* Innuendo's *against it*; *And gives such* Accounts *of* Tithes *as may effectually* Overthrow *them.*

(a) *Considerations touching the likeliest Means to remove Hirelings out of the Church.*

The

The Clergy *were not insensible of this, and therefore sent out* Armed Pens *against that* Tithe-historian, *upon the first appearance of his Book; which threatned so great* Danger *to their* Copy-holds, *and* Parsonage-Barns. *Our Countrey man Sir* James Semple, *and Mr.* Stephen Nettles *attack'd the first and second* Chapters, *concerning* Scripture-Testimony, *and the Practice of the* Jews. *B.* Montague, *Dr.* Sclaiter, *D.* Tildesly, *and others pretend to answer his whole* Book, *but do it in my Apprehension more* Tartly *than* Strongly. *Dr.* Comber *hath collected and improven the* Substance *of all that had been urg'd before him: Commends the Author's* Industry *and* Parts, *but censures him for* Partiality, *and* Mistakes. *To reconcile which, he tells us, that Mr.* Selden *was not much above* 30 *Years of Age when he wrote his* History, *and being a Man of* Business, *was forced to take many of his* Quotations *upon* Trust *from others. A late ingenious* Writter (a) *goes another way to* Work *with Mr.* Selden, *whom he pretends to Confute* ex concessis, *and by the By throws away some of his* Banter *upon* Milton; *Alledging*, that he wrote for Hire against his own Opinion.

(a) *Essay concerning the Divine Right of Tithes by the Author of the Snake in the Grass.*

Some tell us, that Selden's Book *was compiled in* Reſentment *of the* Play *called* Ignoramus, *preſented by the* Cambridge Schollars to King James, *upon his coming there in that ſharp* Winter 16:4: *The which* Play *doth much expoſe and ridicule the* Common Lawyers. *But whatever was the Occaſion of Mr.* Seldens *printing his* Thoughts *upon that* Subject, *his work is ſtill juſtly eſteemed by the* Learned World, *and keeps it's* Ground, *notwithſtanding all the* Objection-ſhot *that hath been levelled at it.*

Sir George Mackenzie *of* Roſehaugh, *Advocat to King* Charles II, *Who hath obliged his Countrey with ſeveral uſeful* Works, *did once ſet about the clearing of the myſterious part of our* Law *concerning* Tithes: *But he had ſcarce well begun, when Interruptions of Buſineſs diverted the* Proſecution *of that* Deſign.

Having undertaken to treat the Complex Subject *of* Benefices; *I ſhall gratifie the Readers anticipating* Curioſity, *with a ſhort* Sketch *of the Performance. As* Benefices *do conſiſt of a* Temporality *and* Spirituality: *So this Treatiſe is divided in two Parts; The firſt being allotted for the* Temporality, *and the ſecond for the* Spirituality.

The firſt Part is thrown into this Order.

I begin with a brief Hint *concerning the precarious Mean of* Subsistance *of the* Primitive Clergy; *and shew why, and when the* Patrimony *of the* Church *was term'd* Benefices; *and explain the kinds of 'em, viz.* Regular *and* Secular Benefices, Titles, *and* Commendams. *For understanding the Nature of* Regular Benefices, *there is an Historical Relation of the* Origine, Nature, *and* Progress *of* Monachism *and* Religious Orders, *and of their regular* Polity. Secular Benefices *are distinguished into* Orders *and* Dignities; *into those of* Cure, *and* Sine-Cures; *and into* Prelacies, *and the* Livings *of the inferior* Clergy, *such as* Parish-Churches, Chappelries, *and* Altarages. Parish-Churches *are divided into dependent and independent* Benefices: *Under the former are comprehended* Mensal, *and under the Latter* Common-Churches, *and those under* Patronage. *All which things are fully discoursed of, and cleared up: With a particular Account of the* Rise, Nature, Progress *and* Fate *of* Patronage. *These* Matters *are succeeded by the* History of Ecclesiastical Revenues *from the Commencement of* Christianity, *till the appointing of* Commissions *of* Parliament *for* Planting of Churches, *and modifying* Stipends *to* Ministers *out of the* Tithes. *And then the* Temporality *of* Benefices *is treated*

of in this manner. I explain, 1. *How* Titles *to* Benefices *are acquir'd by* Eccleſiaſticks; *And when they Commence to take effect. Where* Annats *and the Crimes of* Simony *and* Barratry *are diſcours'd.* 2. *What way* Titles *to* Benefices *are Extinguiſh'd; and when they ceaſe to have effect. Where the* Ann *due to the* Relict, Bairns *or* Neareſt *of* Kin *of* Incumbents *is treated.* 3. *I ſpeak of* Rights *to* Benefices *that may be acquir'd from* Beneficiaries. 4. *Of* Rights *acquireable by them.* 5. *I conſider* Benefic'd Perſons *in the* Triple Capacity *of* Subjects, Superiors, *and* Vaſſals, *and ſhew what is due to, and by them in theſe different Reſpects. Under which* Head *the* Plea *of* Church-men *for an Exemption from* Subſidies *is brought in; The* Nature *of* Eccleſiaſtical Superiorities *clear'd up, with an Account of what hath been the* Fate *of it in* Scotland *ſince the* Reformation.

The Spirituality *of* Benefices *is the* Subject *of the* Second Part. *Where I treat of* Churches, Church-yards, Manſes, Glebes, *and* Tithes. *The* Method *purſued in clearing up the* Subject *of* Tithes *is this; After premiſing of a diſtinct* Hiſtory *of them, the* Queſtion *by what* Law Tithes *are due, is diſcuſt. Into which more* Learn'd *than* Uſe-

ful

ful Controverſy *I dip no further, than only to ſet down different* Opinions; *With the* Great Lines of Arguments *adduc'd for proving* Tithes *to be due by the* Law of GOD and Nature, *and to* Anſwer *them* Breifly. *I explain the ſeveral kinds of* Tithes, *the different* Rights *of them, their* Nature, *and how* Acquir'd *and* Extinguiſhed; *The* Burdens *affecting* Tithes; *and how they are made effectual by* Payment: *Being ſpecially* Careful *all along to diſtinguiſh the* Poſitive *from the* Negative Preſcription, *and* Parſonage *from* Vicarage. *Becauſe* Tithes *are the* Common Fund *of* Miniſters Proviſion, *the* One *whereof is* Modified *&* Allocat, *and the* Other Valued *and ſold by* Decreets *of the* Commiſſion; *And* Points *of* Right *ariſing from thence are* Decided *by the* Lords of Seſſion: Actions *before the* Commiſſion *are firſt treated; and then ſuch as fall under the* Cogniſance *of the* Lords *of* Seſſion. *I have wav'd the* Forein *and* Unprofitable Queſtions *and* Controverſies *with which the* Prodigious Volumes *of the* Doctors *concerning* Benefices *and* Tithes *do ſwell; Contenting my ſelf to notice what is therein* Homogenious *to our* Conſtitution; *and how far the* Scots *&* Canon Laws *do* Agree *and* Differ. *But have not ſpar'd throughout the whole* Treatiſe *to make uſeful* Digreſſions

greſſions *of* Illuſtration, Hiſtory, *and* Deſcription, *here and there*; *As the* Darkneſs *and* Importance *of the* Matter *ſeem'd to require it. I don't upon all* Occaſions *cite my* Author *for avoiding* Prolixity, *except in* Points *of* Right *or* Law: *But there is not any thing here, that I know, poſitively advanc'd without* Good Authority.

Having form'd this contracted Idea of my Book *to pleaſe the* Reader, *I ſhall for his further* Satisfaction *declare what* Materials *and* Helps *I had in the* Compiling. *Beſides the particular* Law-tracts *concerning* Benefices *and* Tithes, *which are here made uſe of only in ſo far as they are founded in the* Analogy *of our own* Law: *I have peruſed* Hiſtories *not a few, and conſulted* Original Charters, Chartularies *of* Abbacies, *and other* Manuſcripts. *I cite upon Occaſions* Craig de Feudis, *Sir* Geo: Mackenzie's Obſervations upon the Acts of Parliament; *And ſometimes thoſe* Learned Notes *upon* Dirletoun *by Sir* James Stuart *of* Gutters *Her Majeſties Advocat. Sometimes again I mention that* Elaborate Compoſure *by Sir* James Dalrymple *of* Killoch, *one of the* Principal Clerks *of* Seſſion, *which is coming out under the Title of* Collections concerning the *Scotiſh* Hiſtory. *I owe particular* Thanks

to

to that Great Antiquary, *for generouſly affording me ſuch* Helps *as were in his Hands any way reſpecting the* Subject *of my* Book. *While my Hand is in, I muſt not forget my beſt* Acknowledgements *for the many* Hints *of* Direction *I got in the* Learned *and* Judicious Viſcount *of* Stair's Inſtitutions: *To which* Book *for its* Univerſal Uſe, *I may Juſtly apply the antient* Proverb *concerning* Azo's *Summ*: He who wants it, ſhould ſell his Cloke and buy it. *I was put to the more Trouble in perfecting this* Work, *through the loſs of the* Commiſſion-Regiſters: *But yet dare ſay that few* Material Occurences *before that* Judicature *have eſcap'd my* Obſervation. *For I had an* Abſtract *of all that paſs'd till* November 1673. *And any Decreet of Moment ſince that time hath been Friendly Communicated to me by the* Parties, *or their* Doers.

At EDINBURGH *the 8th. Day of* March 1705 *Years.*

ANENT the Petition presented to the Lords of Her Majesties Privy Council by Mr, *William Forbes* Advocat: Shewing, That where the saids Lords are in use to Incourage the Author of any new Book, by granting to him the Sole Priviledge of Printing and Vending the same; And the Petitioner having composed *A Treatise of Church-lands and Tithes*, &c. Which will clear up that mysterious part of our Law; Therefore Craving to the Effect after-mentioned: The Lords of Her Majesties Privy Council do hereby Grant to the Petitioner his Heirs or Assignies, the Sole Priviledge of Printing, Vending, and Selling the foresaid Book, Entituled, *A Treatise of Church-lands and Tithes*, &c. And discharges all other Persons whatsomever to Print, Re-print, Sell, or Import into this Kingdom any of the saids Books for the space of Nineteen Years from the date hereof; And that under the Pain and Penalty of Confiscation of the saids Books, to the Use of the Petitioner and his Foresaids; And farder, under the Penalty of Five Hundred Merks *Scots* Money, to be pay'd by the Contraveeners to the Petitioner, or his Foresaids, besides the Seizure and Forefaulture foresaid. *Extracted by me*

ROBERT FORBES, *Cls. Sti. Conciliі.*

A TREATISE OF *Church-Lands, and Tithes, &c.*

PART. I.

CHAP. I.

Why, and when, the Patrimony of the Church was called Benefices? The Division of Benefices into Regular and Secular, and into Titles and Commendams, *Explained. Where of the Rise, and Nature of* Commendams, *and the Difference betwixt Temporary, and Perpetual* Commendams.

THE Primitive Christian Clergy lived precariously on the Free-will Offerings of the People. The Reason whereof some ascribe to their persecuted State, that did not admit of more fix'd Endowments; others conjecture, that they sought not after these, from

a Prospect of the sudden and infallible Ruine that was coming upon *Jerusalem*. When the Cloud of Persecution was dispelled, and the Sun of Prosperity began to shine upon the Church, Generous Converts appeared mighty forward to give her certain Rents, and Possessions, which Church-men enjoyed in common, for some time: But wearying of this, the Stock of the Church came to be divided among them, and particular Revenues annex'd and mortified to particular Offices. This divided Patrimony of the Church goes under the Denomination of *Benefices*. Benefices were Terms us'd, in times past, to signify Funds given to Souldiers, for a Reward of their Services: So called, because they were the Effects of Bounty and Liberality. The Name pass'd to Ecclesiasticks about the Twelfth Century, when they got the like Funds of Subsistence.

2. There were Regular Benefices belonging to Monks and Regulars; and Secular Benefices which were the proper Livings of Church-men: And both consisted of a Temporality, and Spirituality. By the Temporality we mean Lands, with other Civil Rights and Possessions; and under the Spirituality comprehend Tithes, Churches, Church-yards, Church-mens Glebes, and Manses. The Tithes are computed to be more than a fourth part of the Rent of *Scotland*; and the Temporality to be at least a fourth. (*a*)

(a) *Mackenzie Observ. on the* 277 *Act* 15 *Parl. J.* 6.

3. Benefices

3. Benefices again of both kinds were either given in *Title*, or *Commendam*. He who had a Benefice in Title, or *qui erat in Titulo*, had Right thereto *tanquam ſuum*, during his Life; with Power to grant Rights of it, and diſpoſe of the Rents: And was called *Titular*, perhaps from the old Cuſtom of Poſting upon Altars, or Churches, the Titles and Arms of thoſe preſented to them.

4. Such as have Benefices in *Commendam* only, are termed *Commendators*. Theſe at firſt were only deſign'd as Stewards and Overſeers, to call for and receive the Rents, until Titulars were provided; for which they were anſwerable, and lyable to hold Compt. In Proceſs of Time, ſome of 'em turn'd Factors *in Rem ſuam*, and Titulars in Effect. By the Influence of Moyen and Friendſhip at the Court of *Rome*, they got Powers to diſpoſe upon the Benefice in the ſame manner as Titulars, and to apply the Profits to their own Uſe, during their Life-time. Hence aroſe the Diſtinction of *Commendams* into Temporary, and Perpetual. The former, as being in favours of the Church, might have been granted by the Biſhop. (*a*) But no meaner Man than the Pope himſelf, cou'd confer a perpetual *Commendam*. (*b*) *Cujus reſpectu omnia Beneficia ſunt Manualia*, as *Baldus* expreſſeth it. By the 3. *Act* 1. *Parl. J.* 3. *Commendams* are diſcharg'd, without annulling the Deeds of Commendators: And there-

(a) *Garcia de Beneficiis, Tome* 1. *P.* 4 *C.* 4. *N.* 8. *Zoeſ. in Decretal. Lib.* 3. *Tit.* 5. *N.* 61. (b) *Ibid. Garcia, Ibid. N.* 13.

fore many ſuch have been ſuſtained ſince that time. But then Rights made by Commendators, tho with Conſent of the Chapters, are only binding in our Law, during the ſtanding of the Commendators own Right. (*a*) The Reaſon for introducing Perpetual *Commendams*, was partly, that the Pope might be able to compliment his Favourite, with the Enjoyment of a Benefice under the Title of Commendator, who was incapable by the Canon Law to hold the ſame as Titular: Partly, that two incompatible Benefices might be beſtowed upon one Perſon, without infringing the Canons, by making him Titular in the one, and Commendator in the other; or by giving him both in perpetual *Commendam*. But a Grant of a Benefice in *Commendam* was preſum'd to be Temporary, and a Truſt for the Titulars behoof; unleſs conceived expreſly in favours of the Obtainer for his Lifetime, with Power to apply the Rents to his own Uſe. (*b*)

5. Some Benefices are called Great, or Conſiſtorial Benefices, from the Popes Cuſtom of beſtowing them deliberatly in the Conſiſtory of Cardinals.

6. For underſtanding the Nature of Regular Benefices, it will be fit to give ſome Hiſtorical Account of Monachiſm, and Religious Orders.

(a) *Mackenzie Obſerv. on the Act* 3. *Parl.* 1. *J.* 3. (b) *Hope Maj. Pratt.*

CHAP.

CHAP. II.

The History of the Origine, Nature, and Progress of Monachism, and Religious Orders.

MONKS, at the beginning, were a parcel of Men, whom the Heat of Persecution, in the Infancy of Christianity, had forc'd into Desarts; where they liv'd more safely, and serv'd God without Disturbance. All their Employment consisted in Prayer and Meditation, and Reading the Holy Scriptures. Of this sort were our ancient *Culdees*, or *Keldees*: So termed, either because they were *Cultores Dei*, according to *Hector Boeth*; or from Living in Cells, as B. *Spotswood* wou'd have it. They were Christian *Britains*, who flying *Diocleſian*'s Persecution, retired first to the Isle of *Man*, and afterwards spread themselves through this Nation. They lived solitary, but famous for Learning and a good Life, breathing a Spirit of Devotion: And left such an Opinion of their Holiness behind 'em, that their Cells, after their Death, were converted into Churches. So, *Kilmarnock*, *Kilpatrick*, *Kilriny*, &c. is as who should say, *Cella Marnoci*, *Cella Patricii*, *Cella Niniani*, *&c.*

2. Many of the Monkish Devoto's, the times growing more calm, found so much Content

in a retired Life, as they were loth to return to Secular Buſineſs. Being acted by a miſtaken Principle, as if the Perfection of the Chriſtian Religion conſiſted not in Action, but in Retirement and Contemplation; and our higheſt Imitation of Chriſt lay in following him into the Wilderneſs to be tempted of the Devil, and not in walking as he walked, who converſed with the World. Yea, ſome not thinking it ſufficient ſimply to withdraw for Devotions ſake, from the Preſs of the People, and Noiſe of a Tempting World, were pleas'd with all to expoſe themſelves to the moſt auſtere Exerciſes of Mortification. *Simeon Stylites*, or of the Pillar, may ſerve for an Example, who liv'd in the Firſt Century, and was ſurnamed from his Abode upon a Pillar, 36 Cubits high, where he ſtood not a few Years with a Chain to his Foot, Aſſiduous in Prayer, and Faſting after a ſtrange faſhion.

3. But tho' many of the Solitaries wou'd not abandon their Lurking Places, even after the Blaſt of Perſecution was over; yet the moſt part found it convenient to go together into Monaſtries, where they might be aſſiſting and comfortable to one another. This was done by the Influence of *Columba*'s Perſwaſion, who in *Congallus* the Second's Reign, return'd from *Ireland*, whither he had gone (*a*) with S. *Patrick* to aſſiſt in the Converſion of that Nation. He founded the Monaſtery of *Icolmkil* for that end, in one of our Weſtern Iſles.

(a) *Anno* 491.

Where

Where he led a Pious and Exemplary Life, keeping ſtrict Diſcipline over his Monks: To whom he gave Precepts of Direction, without obliging them to any Vows. After this Example, other Monaſtries were erected at *Abernethy*, *Dunkeld*, *Kilrimont*, *Abercorn*, *Melroſs*, *Lochleven*, *Monimusk*, *Kirkaldy*: And the Monaſtry of *Icolmkil* had an extended Juriſdiction over all the reſt. Theſe Monaſtries were Nurſeries and Seminaries of Religion, and Learning, out of which Parochial Churches were planted with Miniſters. *Buchanan* tells us, that *Palladius* was the firſt Biſhop in *Scotland*, and that till he came here, the Church was rul'd by theſe Monks with more Simplicity and Holineſs, and leſs Pride and Pageantry. But others are of Opinion, that they finding the Number of the Faithful much increas'd, choſe Biſhops out of their own Number, as Ambulatory Superintendents of the Church, called *Epiſcopi Scotorum*. Theſe *Keldees* being diligent and fruitful in Works of Piety, were in ſuch Eſteem, That *Conſtantine* 3, one of our Kings, died a *Keldee* at S. *Andrews*. They did always mightily oppoſe the Introduction of Popiſh Innovations: But the Emiſſaries of *Rome* having gained upon the eaſy Mind of King *David*; a Legate from Pope *Innocent* 2 was received in *Scotland* in the Year 1138, with a great deal of Ceremony and Reſpect. After which time Prelates began to get up their Heads among us, and to drive us to Superſtition and Idolatry: But were not able to ſuppreſs the *Keldees*, as that Learned and Judicious Antiquary S. *James*

James Dalrymple obſerves, (*a*) till the beginning of the Fourteenth Century. Pains was taken firſt to Proſelyte their Abbots with the Bait of Preferment to new erected Biſhopricks; and *Keldees* poſſeſs'd of Parochial Churches were ſuffer'd to enjoy their Benefices during Life. At length what by theſe, and forcible methods, that Pious Set of Men was quite thruſt out: Upon whoſe Ruines, a moſt corrupt Regular and Secular Clergy ſet up. Monachiſm in *Scotland*, by the Diſtinction of Vows, Rules, and different Orders, became a motely kind of thing: And Monks, without regard to theſe, turn'd quite unruly and diſorderly.

4. 'Tis beſide my purpoſe to ſpeak of all the Religious Orders, Hiſtorians are not agreed about the Number of 'em. Mr. *Fox*, (*b*) reckons up no fewer than 102 different Orders of Monks and Friars in Chriſtendom. Let it ſuffice me to notice the chief of thoſe that took Footing in *Scotland*.

5. S. *Baſil* founded the moſt ancient, if not the only Order of Monks in the Eaſt; S. *Auguſtine* contriv'd a famous Order in *Africk*; and *Benedict* an *Italian* born at *Nurſi*, was the firſt who brought the Monks in *Europe* under the Ties of Vows, and Rules as to Lodging, Habit, and Diet. His Diſciples were called *Benedictines*. The Abbeys of *Icolmkil*, *Dumfermling*, S. *Colm*, *Aberbrothock*, and the Priories of *Coldinghame* and *Trefontana* were inhabited by

(a) *Collections concerning the Scottiſh Hiſtorie, Chap.* 9.
(b) *Acts and Monum.*

Monks

Monks of this Kidney: And from this Order, many others have ſprung, as thoſe of *Valombre* in *Tuſcany*, the *Carthuſians*, *Ciſtercians*, and the *Congregation of Cluny*.

6. *Malvoiſin* Biſhop of S. *Andrews* introduc'd the Monks of *Valombre* among us, (*a*) with whom the Priories of *Archattan*, *Leſmahagoe*, *Pluſcartie*, and *Beawly* were planted. Thoſe of *Pluſcartie* wrote a *Scots* Chronicle.

7. The Auſtere *Carthuſian* Order, (ſo called from a frightful Solitude near to *Grenoble* in *Dauphinèe*) was ſet up by *Bruno* a Canon of *Reims*, about the Year 1086. But the Learned differ as to the Occaſion of his Retreat. Some aſcribe it to a Prodigy, ſaid to have happen'd while he was preſent at the ſaying of Maſs for a famous Doctor of *Paris*, who lifted up his Head thrice from off the Bier, crying out, firſt, that he was Accus'd, then Judg'd, and finally Damn'd, by the juſt Judgment of God. Others diſprove that Story, alledging, that *Bruno* had no other Reaſon for his Renouncing the World, than a Senſe of the Vanity on't, and a Deteſtation of the looſe Lives of ſeveral Monks. King *James* the Firſt brought theſe *Carthuſians* into *Scotland*; and built them a Beautiful Priory in *Perth*. Their Inſtitution was of the moſt rigid kind. They were not allowed to go out of their Monaſtry, or to converſe together; But were enjoined perpetual ſilence, and forbid to eat Fleſh in any caſe whatſoever, or to look upon the fair Sex. *Volateran* reports

(a) *Anno* 1219.

of

of *Bruno* their Father, that, for 50 Years, he wou'd never see a Womans Face.

8. The Monks of the Abbey of *Molesme* within the Diocese of *Langres* in *France*, having about the Year of our Lord 1098 extremely deborded from the Rule of their Institution, 21 of them, together with *Robert* the Abbot, concerning a just Abhorrency of the Dissolute Life of their Fellows; left the Monastry, and fix'd at *Citeaux*, a wild and desolate Solitude in the Diocese of *Chalons* in *Burgundy*: Thence came the Name of *Cistercians*. Resolving upon a strict and Reformed Life, according to the Discipline of S. *Bennet*; They, by the Authority of the Bishops of *Lyons*, and *Chalons*, and *Otho* I. Duke of *Burgundy*, erected an Abbey: And distinguished themselves by a white Habit, from the *Benedictines*, who went in black. At first they seem'd altogether mortified to the World, but soon acquired great Riches, through a mighty Opinion that Men had of their Piety. This Order was approven by *Urban* 2; mightily increas'd under *Innocent* 2; and was exeem'd from payment of Tithes by *Adrian* 4. For which Immunity I know no other Reason, if it was not because they professed to be a sort of Refin'd *Benedictines*, and that Pope was at first a *Benedictine* Monk; or else, that there was Bribery in the case; For Popes commonly granted to Monks for Money, as many Exemptions as they pleas'd. The *Cistertians* were named *Bernardines*, for that their Order was render'd famous and Amplify'd by S. *Bernard*, to that Degree of Power,

Power, as it govern'd moſt part of *Europe* a whole Age both in Spiritual and Temporal Concerns. The Monaſtries of *Sandel*, *Soul-Seat*, *Dundrennan*, *Melroſs*, *Newbottle*, *New-Abbey*, *Glenluce*, *Balmerino*, *Cowper* in *Angus*, *Deer*, *Kelſo*, *Cubroſs*, and the Priories of *Elquhow*, and *Machline* belong'd to this Order of *Ciſtertians*. The Monaſtry of *Paſley* was once fill'd with 'em, in whoſe Room the Monks of *Cluny* came afterwards, to whom the *Ciſtertians* had formerly ſucceeded in that Cloiſter.

9. The Congregation of *Cluny* was a famous Order of Monks inſtitute in the Year 910 by *Berno* in *France*, where they have their principal Abbey. Of the Greatneſs whereof we may make an Eſtimate from it's being found ſufficient to afford Lodging to Pope *Innocent* 4, with 2 Patriarchs, 12 Cardinals, 3 Arch-Biſhops, and 15 Biſhops, *&c.* As alſo, at the ſame time, to *Lewis* the Eleventh, with the Duke of *Artois*, and the Emperor *Baldwin*. We had firſt Monks of *Cluny* in the Monaſtry of *Paſley*, and then *Ciſtertians*, and afterwards thoſe of *Cluny* again: With whom alſo the Abbey of *Rewls-croſs*, or *Corſraguel* was planted.

10. *Norbert* Arch-Biſhop of *Maydenburg* did inſtitute the Order of *Premontre* in a place of that Name within the Dioceſe of *Laon* in *France*, about the Year 1120. The Monks pretend it was ſo called, becauſe the place was *Divinâ Revelatione Præmonſtratum*. They were under the Rule of S. *Auguſtine*, and had five Convents in *Scotland*, *viz.* the Abbeys of *Tungland*, *Holywood*, *Dryburgh*, *Fern*, and the Priory of *Whithorn*.

11. The

11. The *Mendicants*, or Begging Friers, arose in the Twelfth Century. Who were not as the Monks confin'd to their Cloisters, but allowed to go about for their Living; and to Preach in the Neighbouring Paroches. They are branch'd into the five Orders of *Carmelites*, *Dominicans*, *Franciscans*, *Augustinians* or the *Hermites* of S. *Augustine*, and the Trinity Friers or *Mathurins*.

12. The *Carmelites* were several Western Pilgrims pick'd up by the Patriarch of *Antioch*, and plac'd in a Monastry upon Mount *Carmel*, about the Year 1160, while *Alexander* 3 was called *his Holiness* at *Rome*. They boast themselves to be the Successors of *Elias*, because *Carmel* was formerly the Retreat and Residence of that Prophet. Being expelled thence in the Year 1338, they came into *Europe*; and in King *Alexander* 3*d*'s time, to *Scotland*, where they had their Convents at *Dumbar*, *Linlithgow*, *Tillilum*, *Queensferry*, *Aberdeen*, *Irving*, and *Bamff*. This Order was called, the White Friers; and hath furnished many Bishops, Preachers, and Learned Men to the *Romish* Church.

13. The *Dominicans*, or Black Friers, had S. *Dominick de Guzman* a *Spaniard*, who contrived the Inquisition, for their Founder; and were called the *Preachers*, from their Preaching down Heresy, as *Roman* Catholicks term the Protestant Doctrine. In *France* they went under the Name of *Jacobines*, because their first Convent was in S. *James*'s Street of *Paris*. This Order is said to have been confirm'd by *Inno-*

cent

cent 3, after a Vision he had of *Dominick* shouldering up the *Lateran* Church.

14. The Order of *Franciscans* or the Gray Friers, called also the *Minor Brethren* were instituted by S. *Francis* an *Italian*, about the Year 1208, approven by Pope *Innocent* 3, and confirm'd by *Honorius* 3. This S. *Francis* had been a dissolute Merchant in his Youth, who upon the Wakening of his Conscience, put himself under the greatest Austerities; and turn'd so compassionate, that he cou'd not find in his Heart to kill a Louse. He endeavoured by Preaching to Beasts, and Teaching Birds their Catechism, and Sheep to Bleat out their Canonical Hours, and such like Holy Feats, to treasure up a Stock of Merit in the Bank of his Fraternity. He prescribed extreme Poverty to his Followers, that they shou'd go bare-footed, girt with a Rope about their Wasts, and beg their daily Bread. They were not allowed to handle Money, or to possess any thing in Property, and scarce could call their Wearing Clothes their own. To gain Credit to this Order, a Story was vented, That a matter of two Years before S. *Francis*'s Death, a Seraphim, as he was Fasting and Praying, Imprinted upon the several parts of his Body, the same Marks and Wounds our Saviour bore upon the Cross.

15. We had no *Dominicans* or *Franciscans* in *Scotland*, till a Sample of 'em came from *France* with Bishop *Malvoisin* in the Year 1219. But they soon got into a mighty Esteem with the People, invaded the Pulpits, and lessen'd the Reputation of the Priests. Both these Orders had

had their Convents at *Edinburgh*, *Glaſgow*, *Air*, *Perth*, *Dundee*, *Stirling*, *Aberdeen*, *Elgine*, St. *Andrews*, *Haddingtoun*, *Dumfreis* and *Innerkeithing*. The *Franciſcans* alſo had their Houſes at *Roxburgh*, and *Lanerick*; and the *Dominicans* at *Wigtoun*, *Montroſe*, *Inverneſs*, *Jedburgh*, *Linlithgow*, *Kinghorn*, *Dyſert*, *Forres* and *Selkirk*. Theſe Black and Gray Friers had the Ground Annuals within Burgh, for their Patrimony: And all their Poſſeſſions within the Juriſdiction of *Edinburgh* were diſponed to that Good Town by Queen *Mary*'s Charter dated *March* 13. 1566, and ratified by King *Charles* the Firſt in the Year 1636. The *Franciſcans* are ſubdivided into *Minims*, *Recolets*, *Capuchins*, &c. The firſt aſſum'd the Name of *Minims* out of Humility. The *Recolets* were ſo called from Manſions that *Clement* 7. caus'd to be given them for receiving ſuch as had the Spirit of Recollection. *Capuchins* borrow their Name from their long Hood or Cowl, which is ſow'd to their Habit, and hangs generally down their back. They wore neither Shirts, nor Breeches.

16. The *Auguſtinians* or *Regular Canons* poſſeſs'd the Abbeys of *Jedburgh*, *Halyroodhouſe*, *Cambuſkenneth*, *Inchaffray*, *Scoon*, and the Priories of *Holycroſs*, S. *Mary Iſle*, S. *Andrews*, *May*, *Pittenweem*, *Monimusk*, *Reſtennoth*, *Straphillan*, *Blantyre*, *Portmellock*, and *Lochtay*. There flouriſhed a Colledge of *Canons Regular* in *Chanery* of *Roſs* Shire, from which the Town got that Name. The Difference betwixt Monks and Regular Canons conſiſted in this, that the latter took the Charge of Pariſh Churches, and

and perform'd Eccleſiaſtical Functions in any place; whereas the former ſeldom diſcharg'd theſe Offices out of their Monaſtries.

17. The Order of *the Trinity Friers* was approven and confirm'd by Pope *Innocent* 3, and boaſts not to be of Man's making, but of God's. For the Popiſh Writers tell us, that S. *John* of *Matha*, firſt Patriarch of the Order, was warn'd by God in a Viſion to ſet it up. Their Principle and Work was, to beg Alms for the Redemption of Chriſtian Captives from Turkiſh Slavery: Which they us'd to tranſmit to *Tangier*, and other places by the Hands of one of their Number. Their Benefices were called *Miniſtries*, and the Prelate was called *Miniſter*: Such were the Miniſters of *Fale*, *Peebles*, *Scotland-well*, and the *Trinity Friers* of *Aberdeen*.

18. The Society of *Jeſuites* was founded in the Year 1534 by *Ignatius Loyola*, a Gentleman of *Biſcay*, who finding himſelf diſabled and lame of both his Legs, did caſt about to gain a Livelyhood by Devotion. This Order of Men hath obtain'd ſuch Priviledges from *Rome*, as makes it terrible to all others. They convert themſelves into all Shapes, intrude into all Courts, and make it their buſineſs to wheedle eminent Schollars into their Society. Whereby they are able to maintain their vaſt Authority, and to ſupport the Papal Chair. But yet, for all their Politick Arts and Skill, have had the Mortification to be baniſhed one time or other, out of moſt of the Courts of *Europe*. The Reformation came on before that ſly Generation of Men got any Houſe over

over their Heads in *Scotland*. They were beginning to brood under the late King *James*, in a Colledge, in the Abbey of *Halyroodhouse*: But were turn'd out of that Neſt, at the Revolution; and we hope ſhall never return, or be publickly ſeen in *Scotland*, except *in Effigie*.

19. The Jeſuites, Carmelites, and Capuchin Friers, are now us'd to be ſent as Miſſionaries to Preach Converſion to thoſe in *Turkey*, *Perſia*, *Georgia*, *Africa*, *Eaſt-Indies*, *Congo*, &c. And they ordinarly introduce themſelves under the Character of Phyſicians.

20. After having treated of the Original of Monks and Monaſtries; and explain'd the ſeveral Orders they've been pleas'd to model themſelves into: It will not I hope, be thought a miſs, to deſcribe their Regular Polity.

21. A ſhaven Crown was the Badge of all Monks, whereby they pretended to ſignify their firm Expectation of a Crown of Eternal Life; and that they had renounc'd the World. That they might not be at liberty to forſake their Profeſſion when they pleas'd, they made Vows at their Admiſſion; whereof ſome were peculiar to every particular Religious Order; others common to all Orders, as the three Vows of Chaſtity, Poverty, and Obedience. The firſt hath given occaſion to much Lewdneſs and Uncleanneſs committed by Perſons, who found themſelves uncapable of keeping to their raſh Vow of Chaſtity; whereby not only Incontinence, but even Marriage is excluded; which is ſtrange to ſee in a Church, that

that esteems Marriage a Sacrament. The second hath tempted People to misplace their Liberality on a Pack of Idle Abbey-Lubbers; to the Robbing of the Real Poor of that Charity, which is their due. As to the Vow of Obedience, how many Villanies have proceeded from their conceiving themselves bound implicitely to obey the Commands of their Superior.

22. Monks liv'd at first by their Industry, and some private Alms, the People gave them for the Help of their Prayers. They came to the Parish Church with the rest of the People, and sometimes sent for a Priest to administer the Sacraments to them. At length they were allow'd to have one of their own Number to Officiate only in the Monastry; which gave them Occasion to have particular Churches, and make a kind of Regular Clergy. It was Pope *Gregory* permitted them to celebrate private Mass in the Monastry; which turn'd to very good Account to the Monks, in Attracting much Charity from the People. But not content with all this, they procur'd Exemptions from the Episcopal Jurisdiction. *Robert* Bishop of S. *Andrews*, for Instance, (*a*) *Prece & Consilio D. Regis*, exeem'd all the Churches and Chappels belonging to the Abbacy of *Coldinghame* from their Dependance on the Bishop.

23. Monks had a Subordination of Officers among 'em. The chief was called *Abbot*, in

(*a*) *Anno* 1127.

whom the chief Care and Management of the Monaſtry, was lodg'd. One Monaſtry cou'd not have two Abbots; But I find there hath been many ſorts of 'em: Such as, *Regular Abbots*, who were Monks; and *Secular*, or *Lay Abbots*, or *Abbots in Commendam*, who convers'd with the World, and by Diſpenſation as to their Age, and other Qualities, ſucceeded to the Rights of Regular Abbots. The Difference betwixt Abbots *Commendatory*, and *Regular*, is, That the former enjoy but a Third of the Revenues of their Abbeys, Two Parts being allotted for the Maintenance of the Monks, and Charges of the Monaſtry; whereas the whole was at the others Diſpoſal. Another Speciality in the Commendatory Abbot is this, that tho he be Subſtitute in the Right of the Regular Abbot, yet the Monks are not ſubject to him in what concerns the Rule of their Inſtitution, or Monaſtical Diſcipline: As to which, they are only to obey the Prior, during the time that the Abbey is *in Commendam*; that is, during the Vacancy of the Abbots Office. But then the Commendatory takes upon him to put in, and turn out the Priors. The Dignity of an ordinary Abbot, is next to that of a Biſhop. But ſome Heads of Monaſtries, that they might be Independent of the Biſhops, were freed from their Juriſdiction, and therefore called *Abbates Exempti*. Another kind there was of *Sovereign Mitred Abbots*, that were not only ſubject to no Dioceſan, but alſo inveſted with Epiſcopal Power: In ſign whereof, the uſe of a Mitre and other Epiſcopal

pal Ornaments were indulg'd them. But *Pontius* Abbot of *Cluny*, not content to ſtand upon a Level with Biſhops, did, in a Synod held at *Rome* in the Year 1117, aſſume (as 'twere to vie with the Pope) the Boaſted Title of *Abbot of Abbots*. The *Abbates Exempti* had Juriſdiction over the Monks, to Diſcipline and puniſh them when they tranſgreſs'd the Rules of the Order, or committed a Crime: But Abbots that were ſubject to the Biſhop, behov'd to deliver up their Delinquents to be puniſhed by him, or his Arch-Deacon.

24. Tho the Abbot be Head of his own Monaſtry: Yet ſeveral Monaſtries were under one *Provincial*; without whoſe leave, as Superior of all the Religious Houſes in his Province, no Monk cou'd ſhift his Monaſtry. But ſometimes the Monks, for a juſt, or plauſible Cauſe, as upon the Account of Health, or the like, were tranſlated from one Monaſtry to another; which the Abbot could authoriſe, if the Changeling deſir'd to paſs into a ſtricter Order: But if into one of the like ſtrictneſs, he behov'd to do it with Conſent of the Convent. And if a Monk, finding himſelf uneaſy under the Rigour and Severity of the Rules of his Order, was deſirous to flit to one under milder and leſs rigid Diſcipline, the Pope himſelf behov'd to be conſulted in the matter, and give way to it.

25. Among the Subaltern Officers under the Abbot, the *Prior* held the chief Rank; to whom the *Sub-Prior* was Subordinate, who acted as Prior in his abſence, and during a Va-

cancy of the *Priors* Office; As the *Prior* govern'd the Abbey in the Circumstances of the *Abbots* absence, and a Vacancy of the Abbatial See. These were called *Claustral Priors*, to distinguish them from *Conventual Priors*, who were *Dignitaries*; whereas the others were not. A *Conventual Prior* is one that presides over a Party of Monks detach'd out of some Monastry, and settled in a distant place, to negotiate the Affairs of the Monastry, and look after their remote Lands, and Rents. The House where they liv'd was term'd *Cella*, or *Grangia*, or *Obedientia*, as a Note of Distinction from the principal Monastry on which it depended. So the Priory of *Urquhart* in *Murray*, was a *Cell* belonging to *Dumfermling*; The Priory of *Machline* in *Kile*, depended on the Abbey of *Melross*; The Priory of S. *Mary Isle* in *Galloway*, upon the Abbey of *Holyroodhouse*; The Priories of *Restennot* in *Angus*, and *Blantyre* in *Clidsdale*, were *Cells* pertaining to the Abbey of *Jedburgh*; *Lesmahago* in *Clidsdale*, and the *Isle* of *May* in the River of *Forth*, were *Cells* of *Kelso*. The Church of the *May* us'd to be visited by Barren Women, in hopes to get Children. These *Obedientiaries* sometimes revolted from their Duty, and set up for themselves; which turn'd a Precedent for erecting Independent Priories. And these came at length to have inferior Priories depending upon them: As the Priories of *Monimusk* in *Mar*, *Pittenweem* and *Portmollock* in *Fife*, were *Cells* belonging to the Priory of S. *Andrews*. Many of these Rural Priories having shaken off their Depen-

dance,

dance, and usurp'd an Exemption from the principal Abbey, or Priory, turn'd into Benefices, and were bestowed on Secular Priests, with *Cura Animarum* annex'd: Whence the Original of *Simple Secularized Priories* is deriv'd. But yet in some places the Prior continued a Regular, and serv'd the Cure by some Secular Ecclesiastick, as his Viccar. In these Churches, where the Monks turn'd Secular Canons, a *Provost* came sometimes in place of the Conventual Prior.

26. Some perhaps will expect here an Account of *Nuns*. These, as well as the Monks, did monstrously degenerate from their Primitive Institution. *Brigida*, or S. *Bride*, as they call her, is the first profess'd *Nun* that I read of in our Countrey, who was descended of Honourable Parents in *Caithness*, and retir'd from the World, and a great Estate to which she was born, that she might be devoted to the Service of God. She died and was interr'd at *Abernethy*: And several Virgins copying after her, gave themselves up to Devotion, and a solitary Life. But these, without taking on Vows, did preserve their Chastity more nicely, and unspotted, than later *Nuns*, who, like the Monks, distinguished themselves by Orders, Rules, Vows, and Habit: And in their Nuneries had the different Offices of *Abbess*, *Prioress*, &c.

27. Waving the several Orders of *Nuns* in *Scotland*: They had their Convents in the Priories of *Northberwick*, *Haddingtoun*, *Manwel*, *Coldstream*, *Eccles*, S, *Bothan*, &c. Those of 'em

called the *Gray Sisters* had a House at *Sheens* near *Edinburgh*, another at *Dundee*, and a third at *Aberdeen*. I am inform'd, that 14 Monastries in *Scotland* were govern'd by Women. *Coldinghame*, before it was erected in a Priory for Monks, had been a Sanctuary of Virgins, famous in ancient History for cutting off their Noses, and Lips, to preserve their Chastity from the *Danes*. There were once Nuns in *Lincluden*, whom *Archbald* Earl of *Douglass* expelled for violating their Chastity; and their House was converted by him into a Collegiate Church.

28. *Fuller* (*a*) informs, that Nuns were as numerous in *England*, as Monks and Friers: Having, tho not so many Orders, more of the same Order. He instanceth in that of the *Gilbertines*, an Hermaphrodite Order, admitting Men and Women under the same Roof: In which, for 700 Brethren, there were 1100 Sisters. My Author finds no Writer to have been of this Order: He conceives they took such pleasure in one anothers Company, they had no leisure to put forth Books. However the 20 Canon of the second Synod of *Nice*, expresly provides against double Monastries, that is, the allowing of Cloisters for Men and Women within the Circumference of one and the same Wall.

29. I shall now return from speaking of *Regular Benefices*, to give some Account of those called *Secular Benefices*.

(a) *Church Hist. Lib. 6.*

CHAP.

CHAP. III.

Eccleſiaſtical Offices divided into Orders and Dignities. The 7 Orders of Door Keepers, Readers, Acolytes, and Exorciſts; Sub-Deacons, Deacons and Prieſts explain'd: As alſo the Dignities of Pope, Cardinals, Patriarchs, Primates, Metropolitans, Arch-Biſhops, Biſhops; Their Subalterns of Dean, Sub-Dean, Arch-Deacon, Chanter, Sub-Chanter, Chancellor, Theſaurer, Provoſts, and Epiſcopal Chapters. Secular Benefices divided, 1. into thoſe of Cure, and Sine-Cures. 2. Into Prelacies and thoſe belonging to the Inferior Clergy, ſuch as Pariſh Churches, Chapelries, and Altarages.

BESIDES the Eccleſiaſtical Functions inſtituted by the Apoſtles; others were afterwards introduc'd into the Church by Humane and Eccleſiaſtical Authority. The *Romaniſts* have contriv'd a Set of 'em, not ſo much for Edification of the Faithful, as for eſtabliſhing and ſupporting their Spiritual Hierarchy: Which are uſually diſtinguiſhed into *Orders*, and *Dignities*.

2. Their Orders are ſeven, whereof ſome are called *Minor*, as *Door Keepers*, *Readers*, *Acolytes*,

lytes, and *Exorcists*. Others go under the Designation of greater Orders, as Sub-Deacons, Deacons, and Priests. All invented to support the Sacrifice of the Mass; alluding to the abolished Ministration of the Priests and Levites, under the Old Testament. The *Acolytes* had the Charge of the Lights in the Temple. And the Work of the *Exorcist* was to cast Devils out of Demoniacks, by the Imposition of Hands, and some Conjuring Words.

3. *Dignity* is either an Ecclesiastical Benefice with Jurisdiction, or *quod habet nomen dignitatis cum prerogativa in choro & capitulo.* The *Dignities* are those of *Pope*, *Cardinals*, *Patriarchs*, *Primates*, *Metropolitans*, *Arch-bishops*, *Bishops*; Their *Subalterns* and *Provosts*.

4. The *Pope*, who is now arriv'd at the Pinacle of Ecclesiastical Preferment, what by Fraud, and Force, and the Assistance of the Emperor *Phocas*, acquir'd the proud and lofty Titles of *Christs Vicar*, *Universal Bishop*, *Head of the Church*, *Supreme and Infallible Judge of all Controversies in Religion.* When Popes began to set up for the Successors of S. *Peter*, they called their Estate *Peter's Patrimony*; and the Tribute pay'd them *Peter-Pence*. They pretend to derive a Right from *Constantine* the Great, not only to the Spiritual Dominion over the Church; but also to the Temporal Sovereignty of all *Italy*; and that the Seat of the Empire was remov'd to *Constantinople*, to give way to the Pontifical Power in *Italy*: But the more Judicious of the *Romanists* are justly asham'd to own this Fiction. I confess it is mention'd in the

the Decretals: (a) But so different Accounts are handed about concerning it, that the same is mighty liable to the Suspicion of an Imposture. Nay, if we'll only consider the subsequent State of *Italy*, and the Western Empire, we shall find it no hard matter to dash and beat down this Papal Pretence. For is it not manifest, that *Constantine*, before his Death, divided his Empire among his three Sons, alloting to the eldest the Western parts, to the second the East, and the Countrey interjacent to the youngest: And that *Constantine*'s Successors continued to sway the Scepter in the East, till the Irruption of the *Goths* and *Vandals*. Yet giving, not granting, that Donative had been a true Deed, it could not have subsisted in Law: Since that Prince had only the Administration of the Imperial Revenue; without any Power to dilapidate, or throw it away.

5. *Cardinals* at first, were only Priests or Deacons of the Church of *Rome*: So called from their presiding over some Cardinal or principal Churches. But at present they have got above Arch-Bishops, and are mightily greaten'd, and considerable in the View of the World, through their being Senators of the Popes Consistory, and the only Persons who can elect or be chosen Pope.

6. There were five Patriarchs, as those of *Rome*, *Constantinople*, *Alexandria*, *Antioch* and *Jerusalem*. Which five Patriarchs a Popish Writer (b) fancies to be prefigured in the fourth

(a) C. *Constantinus* 14. *Dist.* 96. (b) *Lyra in Cap.* 4. *Apocalyps. S. Joan.*

Chapter

Chapter of the Revelation, by *one ſitting upon a Throne, and four Beaſts full of Eyes before and behind, round about him.* All Patriarchs are Primates, but all Primates are not Patriarchs: Tho upon the matter their Authority is much what the ſame.

7. Metropolitans or Arch-Biſhops preſided over whole Provinces, differing only in this, that the Metropolitan was look'd on as the more honourable Arch-Biſhop; for that his Seat was in ſome Metropolitan City. Theſe were at firſt ſet over Biſhops, for the ſake of good Order, that the Churches ſcatter'd by Perſecution might be the more conveniently taken care of. But this introducing of Inequality among Biſhops, did pave the way to Ambitious Spirits for aſpiring to greater and greater Degrees of Eccleſiaſtical Dignity. For when *Conſtantine* the Great had reduc'd ſeveral Provinces into one Dioceſe, Metropolitans were ſubjected to Patriarchs and Primates.

8. I find mention made of three kind of Biſhops in the 77. Act of Q. *Mary*'s 9. Parliament: The Biſhop Elect, the Biſhop Poſtulate, and the Biſhop Conſecrate. A Biſhop Elect, is he who is Elected by the Chapter upon the King's *Conge de'eſlire,* but not yet Conſecrate. A Biſhop Poſtulate, was not Elected, but only Called. Theſe Biſhops Poſtulate were not long in *Scotland.* The Paſtoral Staff, Mitre, and Ring are the Symbols of the Epiſcopal Charge. They tell us, that the Ring is given to the Biſhop *tanquam Sponſo Eccleſiæ*; that the Forked Mitre implies the Knowledge of both

the

the Old and New Teſtaments to be the Ornament of his Head, and that he ſhould be Fear'd and had in Reverence by the People; and that the Staff is crooked, to intimate how the Stubborn ought to be drawn into the Boſom of the Church, and gently reduc'd to their Duty. Biſhops, in time of Popery, had both a Spiritual and Civil Juriſdiction within their own Diocy; and each had their own Official, to judge in all Matters of Tithes, Minors, Orphans, and poor Widows; and to confirm Teſtaments. Yea the Spiritual Judge of old was in uſe to Repledge Kirk-men from the Parliament. But Biſhops were depriv'd of their Civil Juriſdiction at the Reformation: And Queen *Mary* appointed *Commiſſars* in the Room of *Officials*.

9. The Biſhops Pariſh Church is term'd a *Cathedral*, from the Chair that ſtands there for him. In every *Cathedral* there are plac'd in a Collegiate way, ſome *Canons* or *Prebendaries* with a Dean over them: And theſe made up the Biſhops Chapter or Council, called *Capitulum* in the Canon Law, as being the Little, or Inferior Head of the Diocy. The Prebends ſate upon Benches in the Quire for performing of Divine Service, and derive their Name either *a Præbendo Auxilium, aut Conſilium Epiſcopo, vel Decano*; which was the uſe they were deſign'd for: Or from *Prebend*, which ſignifies that Portion every Canon receives for his Maintenance out of the Church-Patrimony; for which he was Recorded *in Canone*, that is, the Matricular Book of the Chapter. The dignified Members of the Chapter were diſtinguiſhed

guiſhed by the Titles of *Dean*, *Arch-Deacon*, *Chanter*, *Chancellor*, and *Theſaurer*.

10. The Dean, is thought to have ſucceeded in place of the *Archipresbyter*. But theſe were ſometimes diſtinct Offices; as in the Colledge Church of *Dumbar*, the *Dean* and *Arch-Prieſt* had their ſeveral Prebends. The *Dean* is called *Decanus* in the Canon Law, from his preſiding over ten Prebends: But that Number is not obſerv'd; there being more, or fewer, Canons, according to the different Circumſtances of Foundations.

11. The *Arch-Deacon* is in effect the Biſhops Viccar, and *alter Epiſcopi Oculus*. His Office was to examine ſuch as were preſented to the Biſhop, to put them in Poſſeſſion of their Benefice after Admiſſion, to viſit the Diocy in the Biſhops abſence, and to be a Check upon the Lives, and Manners of the Clergy. Arch-Deacons were generally thought inferior to Cathedral Deans. But whatever be as to theſe Deans, the Arch-Deacon had Rural Deans under him, that is Countrey Parſons, appointed to give Induction for him, when living at a diſtance, and to decide the Differences of the Clergy. Sir *James Dalrymple* (*a*) obſerves the Arch-Deacon of *Lothian* to have been above any Dean on either ſide of *Forth*. The Arch-Deaconry of *Lothian* was gifted to the Town of *Edinburgh* by King *James* 6. upon the Dimiſſion of *Alexander Bethun* the laſt Arch-Deacon thereof, *April* 4. 1584, and annex'd to their Colledge.

(a) *Collections concerning the Scottiſh Hiſtory, Pag.* 295.

12. Whereas

12. Whereas at first the Priests and Deacons did sing Mass in Cathedral Churches, Pope *Gregory* the Great instituted a School of Singers for that purpose. The Rector whereof was called *Primicerius* or the *Chanter*. His Business was to Regulate the Musick, and keep all the Members of the Choir in Tune. Many take *Primicerius* for a Compound Word; some deriving it *a ceris, i. e. ceratis tabulis*, upon which they us'd to write of old, as if *Primicerius* were as much as *Scripturæ Ordine primus*; others fancy the *Chanter* to have been so called, in respect he was *Præpositus Ceris, i. e. Libris Ritualibus*; a third sort will have him to go under the Character of *Primicerius*, from his carrying *Primum Cereum*, the first Taper before the Bishop: But I chuse rather to think, that *Primicerius* is a simple Word, signifying the first or chief of any Order, or Society; for *Peter* us'd to be called *Primicerius Apostolorum*, and *Stephen Primicerius Martyrum*. The Sub-Chanter was the Chanters Depute, who officiated for him in his absence. Many Persons also mortified Revenues for the Maintenance of one, or more Priests, to say daily Mass for their own Souls, or for the Souls of their Friends at some Altar, or in some Chappel of these Cathedral Churches: Which Office was called a Chantery. And when the Service was to be perform'd at an Altar, the Priests Sallary was term'd *Altarage*: However the Founders did not so ingross the Devotion of these Priests, but that they had other Casual Emoluments of *Obits*, *Procession-Pence*, and the like. *Obit* is the Office for the

the Dead, which us'd to be perform'd for one some little time after his Breath was out. For celebrating whereof the Defunct either left a Legacy, or his Friends and Posterity gave some Gratuity. It was also called *Dirge*, from these Words *Dirige nos Domine* in the first Antiphon of the Office.

13. The *Chancellor* was Secretary to the Chapter, and kept the Seal thereof.

14. The Thesaurer had the Custody and Oversight of the Thesaury, and all other things belonging to the Church. Under whom there was a Sacrist, or Vestry Keeper, who discharg'd the drudging part of the Employ.

15. But after all, these Dignitaries are regulated in their Jurisdiction and Precedency by the special Foundations or Local Custom.

16. Those Ecclesiasticks also were called Canons, or Prebends, who had no other special Name. Some Prebends were called *Canonici actu*, as having Right to Vote in the Chapter; others *Canonici in herba*, or *Canonici expectantes*, for that they had a Stall in the Choir, and a Right to the first vacant Prebend, but no Vote in the Chapter. For albeit Benefices cannot be effectually confer'd, before they vake: (*a*) A Prebend may be secured to one who is already chosen a Canon. (*b*) In some Cathedral Chapters there are Laick or Honorary Canons; and some of these Princes, who had been either complimented with that

(a) C. 2. *Extr. de Concess. Præbend.* (b) C. *Relatum de Præbend.* *Bongeus de Benefic. ad Verbum Militia*, C. 4. §. 26. N. 14.

Dignity

Dignity for Services done or to be done to the Church; or had reserv'd it to themselves in Churches founded or indowed by them. So, the Emperor is a Prebend in the *Lateran* Church of *Rome*, and in the Churches of *Cologn*, and *Aix la Chapelle*. The *French* King in the Churches of S. *Hilary* in *Poitiers*, and S. *Martin* in *Tours*. And *Alphonsus* King of *Spain* was a Prebend of the Abbey of *Cluny*. It seems a singular Constitution in the Church of *Lions*, that the Office of Prebend there can only be dispos'd of in favours of one of the Nobility. And we find a Matter of 74 Canons to have been in that Church in the Year 1245, among whom there was an Emperors Son, nine Kings, fourteen Dukes, thirty Earls, and twenty Lords. (*a*)

17. The Dean and Chapter elected the Bishop, (*b*) assisted in some of the Episcopal Functions, and concurr'd in the Administration of Affairs of the Diocy. Only the Arch-Bishop of S. *Andrews* had no Chapter within the Memory of Man, but the consent of the Prior of S. *Andrews* and his Convent, was in stead of one. Whereof possibly the Reason has been, because the Arch-Bishop of S. *Andrews* having founded the Priory out of his own Benefice, did thereby extinguish the Chapter-Churches, and annex them to the Priory. But that Priory being suppress, and erected in a Temporal Lordship in favours of

(a) *Chopin de Sacra Politia, Pag.* 64. *Thomassin la Discipline del'Eglise, Part.* 4. *Lib.* 2. *Chap.* 37. *N.* 1. (b) *Act* 1. *Parl.* 22. *J.* 6.

Ludovick

Ludovick Duke of *Lennox*, a new extraordinary Chapter was appointed for Election of the Biſhop, and an ordinary one for Adminiſtration of Affairs of the Diocy. Two ſuch Chapters were alſo allotted to the See of *Glaſgow*. (a) But the Priory of S. *Andrews* was annex'd to the Arch-Biſhoprick by King *Charles* the Firſt.

18. Having done with Biſhops and their Subalterns; The Dignity of *Provoſts* fall next to be conſider'd. Our Eccleſiaſtick Provoſts are the ſame with the *Præpoſiti* in the Canon Law: Whereof ſome were Governours of Colledges, inſtituted for inſtructing of Youth: As the Provoſt of the old Colledge of S. *Andrews*. Others had the Inſpection, and Overſight of Collegiate Churches, which had been built for Divine Service, and Singing of Maſs, eſpecially for the Souls of their Founders and Patrons; or their Friends. When the Perſons to be pray'd for are dead, the Narrative of the Foundation Charter runs ordinarly *pro anima* of ſuch an one; and if alive, it bears *pro ſalute*. But yet this Diſtinction is not always obſerv'd. A Collegiate Church conſiſted of Prebends or Canons, who had their ſeveral Degrees of Stalls, where they ſate for more orderly ſinging their parts of Muſick; and with their Provoſt made up the Chapter or Convent. But the Collegiate Church of *Dumbar*, by the Foundation, did conſiſt of a *Dean* as the Head, an *Arch-Prieſt*, and the eight ſimple Canons of *Dumbar*, *Pincartoun*, *Spot*, *Beltoun*, *Petcocks*, *Lintoun*, *Duns*,

(a) *Act* 2. *Parl.* 22. *J.* 6.

and

and *Chirnſide*. It was in *Charles* the Great's time, that Cathedral and Collegiate Chapters were inſtituted, and ſettled. (*a*) By the change of the Collegiate Perſons, the Colledge is not chang'd, but remaineth the ſame. (*b*) Nay, the Collegiate Body might ſubſiſt in one Member: (*c*) Altho it cou'd not be originally conſtitute without three Perſons at leaſt. (*d*) The common cauſe, and end, and intereſt, doth occaſion Collegiate Perſons to be conſider'd not ſingly, but as one Body, for the time bygone, preſent, and to come: So that what is reſting to a Collegiate Body, is not due to every Member; nor is every one liable for the Univerſities Debt. (*e*) If no Defence be made; the common Good is ſeiz'd on, and ſold. (*f*) But if the Colledge come to be diſſolv'd, the common Good may be lawfully ſhar'd among the ſeveral Members: (*g*) That is, if by their Contribution it came to the Colledge. Otherwiſe it ſhould return to the Founders, or to their Heirs. (*h*) I ſhall afterwards ſhew, why Popiſh Benefices were not ſo diſpos'd of at the general Diſſolution of the Collegiate Bodies they belong'd to. (*i*)

(a) *Thomaſſin, Ibid Lib.* 4. *Chap.* 28. *N.* 10. (b) *l.* 7. §. 2. *ff. Quod cujuſque Univerſitatis nomine, l.* 77. *ff. de Judiciis.* (c) *d. l.* 7. §. 2. (d) *l.* 85. *ff. de Verb. Signif. Arg. l.* 40. §. 3. *eod.* (e) *d. l.* 7. §. 1. *ff. Quod cujuſque Univ. Nom. l.* 6. §. 1. *ff. de Diviſ. Rerum.* (f) *l.* 1. § 2. *ff. Quod cujuſque Univ. Nom: l:* 8: *eod.* (g) *l:* 3: *pr: ff. de Collegiis Illicitis.* (h) *Greg: Tholoſ: Synt: Jur. p.* 2: *l:* 15: *Cap:* 32: *N:* 17. *& ſeqq.* (i) *vid: Chap.* 5: *N:* 26.

19. Secular Benefices may be divided, 1. into Benefices of Cure, and thoſe without Cure, commonly called *Sine-Cures*. 2. Into Prelacies, and ſuch as pertain to the inferior Clergy. I muſt here add to what hath been ſaid concerning Prelacies and Dignities; That 'tis preſently under Debate before the Lords, (*a*) whether an Arch-Deacon be a Prelate. The Reaſons alledg'd for his being a Prelate are, 1. By the Nature of the Office *præeſt aliis, & capitulo, vel ejus parti.* 2. The Acts of Parliament, particularly in K. *James* the Sixth's time, after the Reſtoration of Epiſcopacy, allowing Tacks by Biſhops and *other Prelates*, import, that Arch-Deacons come under the Denomination of Prelates: Since the Popiſh Offices of Abbots, Priors, and the like were extinct, and unlawful at that time. But out of Modeſty I ſhall leave the Point to the Deciſion of the Bench, where it lies at *Aviſandum*; and content my ſelf to notice, that ſome Prelates, as Provoſts of Collegiate Churches, have this of the Nature of inferior Beneficiaries, that they cannot do effectual Deeds without the Patrons conſent, as well as the Chapters: (*b*) And in ſome reſpects all benefic'd Perſons are conſider'd as Prelates, *viz.* That they may have Heirs, and Heirſhip Moveable. (*c*)

20. The Prieſts or under Clergy, were either diſpos'd into Pariſh Churches, or *Chappel-*

(a) *In the caſe of Sinclair of Barack againſt Sinclair of Southdoun and the Earl of Broadalbin*: (b) *vid: infr: Chap:* 10: *Sect:* 1: *N:* 8: (c) *vid: infr: Chap:* 9: *N:* 2.

ries,

ries, or had their Posts assign'd them at Altars, or in Chappels of Cathedral, or Collegiate Churches. The Priests, who had Fees for singing of Mass in these Chappels, or at such Altars, and made also some Hand with the Casualities of Obits, and Procession-Pence, have been already spoke to: The Nature of Parish Churches, and Chappelries, remain to be cleared up.

21. Parish Churches were either distinct Benefices, or united to other Benefices. Vicarages, and Mensal or Patrimonial Churches were united to other Benefices. Common Churches, and those under Patronage, were possess'd as separate Benefices. For the better understanding of these things, it is proper to notice, that the Bishop, with his Chapter, liv'd once in common upon the Revenue of the Bishoprick, which consisted much in Parish Churches. But about the Twelfth Century, conveniency requiring a Division; some part of it was set off for the common use of the Members of the Chapter, reserving the rest for the Bishops own Maintenance. Hence proceeded the Distinction of Mensal and common Churches.

22. Mensal Churches were *de Mensa Episcopi*, a part of his own Patrimony or Benefice; To the Rents whereof he had Right as Parson or Titular: And the Minister admitted by him, as Vicar or Stipendiary, got only some yearly Portion or Duty out of the Rents, or so much Money for his Maintenance, as the Bishop and he agreed for. These Ministers of

Menſal Churches, in time of Prelacy, depended ſo much upon the Biſhop, that the Commiſſion could not modifie Stipends for them, in the Terms of the Act of Parliament 1633. But ſince the Revolution, they had acceſs to purſue for Modifications and Localities, as well as other Miniſters: Being always oblig'd to cite the Officers of State for the Kings Intereſt. However, in regard the Tithes of ſuch Pariſhes were in the Hands of the Sovereign by the Suppreſſion of Biſhops, the Commiſſion us'd no further to interpoſe their Authority, than by a Recommendation to the Theſaury for a Gift in favours of the Miniſter, equivalent to the legal Stipend.

23. Common Churches were theſe, in the planting whereof with Incumbents, the Members of the Chapters of Cathedral and Collegiate Churches had a joint Intereſt.

24. Churches under Patronage, are to be treated of in the next Chapter: Where the Riſe, Nature, and Progreſs of Patronage is explain'd.

25. The Word *Chappel* certainly comes from *Capella*; but whether that owe it's Original to *Capra*, becauſe the Tabernacle was cover'd with Curtains of Goats Hair; or to *Capana*, *quia paucos capit*; or to *Capa S. Martini* Biſhop of *Tours*, which the *French* Kings of old were wont to carry with them as a Holy Relick in their Warlick Expeditions; or if it be ſo called *a capiendo Laicos*: I ſhall not be poſitive, becauſe I do not know, nor is it much material to know it. This is certain, that there were three

three ſorts of Chappels; Chappels of Eaſe, Free Chappels, and Private Chappels.

26. *Chappels of Eaſe*, aroſe much upon the like occaſion as Synagogues among the Jews. For as they had one Temple at *Jeruſalem*, to which they reſorted thrice a Year, at the ſolemn Feaſts of the Paſſover, Pentecoſt, and Tabernacles, for a Profeſſion of the Unity of their Faith and Worſhip; and that the Exerciſes of Religious Duties might not in the Interval be quite neglected, nor the Knowledge of the Law loſt to the Vulgar; and in conſideration of thoſe whom Age, or Habit of Body, or other Circumſtances wou'd not permit to viſit *Jeruſalem*; were indulg'd the uſe of Synagogues in their Cities, and Villages, where the people met upon the Sabbath for publick Prayer, and to hear the Law read: So when Miniſterial Duties were firſt bounded by Pariſhes, theſe were very wide, and it being found uneaſy for ſuch as dwelt in the remoter parts, eſpecially old and ſickly perſons, and Women with Child, to come up to the Church on all occaſions, for partaking of the Ordinances; Chappels were built for their uſe, and thence called *Chappels of Eaſe*. Theſe were ſerv'd by ſome inferior Curate, maintain'd by the Rector of the Pariſh. But then the people were oblig'd to attend the Ordinances in the parochial Church, at the ſtated Feſtivals of Paſch, Whitſunday, Chriſtmaſs and others. (a) The parochial Church was

(a) *C: ſi quis etiam 35: de Conſecrat: Diſt: 1.*

alſo called the *Baptiſmal*, or *Mother Church*. For underſtanding the Reaſon of which Deſignation, we muſt remember, that the Rites of Baptiſm, in the primitive Times, were performed by Dipping in Rivers, when the Converts were many, and perſons come to Years; and perhaps had not the conveniences that are now in uſe. But afterward that cuſtom went off, and the Water of Baptiſm was put into Veſſels called *Fonts*, from the original practice of Baptizing in Fountains; which were firſt erected in private Houſes, and during the Fury of perſecution tranſplanted to Deſarts. When Chriſtianity got the countenance of civil Authority, Baptiſteries were built in Cathedral and principal Churches. For tho Divine Service might be us'd in Rural Dependent Churches; the Right of Sepulture, and Baptiſm belong'd only to ſome principal ones, called therefore Baptiſmal Churches, or *Eccleſiæ Matrices*, Mother Churches: Becauſe in the Font of Baptiſm, as it were in the Churches Womb, we are regenerated, or born Chriſtians.

27. *Free Chappels* were not within the circumference of any Pariſh, and had proper Endowments for their own Chaplains: Whoſe Bounds of Inſpection were called *Chappelries*, or *Chaplainries*. They had the ſame powers within their *Chappelries*, that the Parſons had within the precincts of their Pariſhes: And therefore were called Parochial Chappels, to diſtinguiſh them from others, that were only deſign'd for Prayer and Preaching.

28. *Private*

28. *Private* or *Secular Chappels* are thoſe built and endowed by Princes and great Men, in or near their own Houſes, for the uſe of their Families. Some of theſe private Chappels are called *Oratories*, as being only deſign'd to pray in; others are built adjoining to a Church, as a part of the ſame, which the proprietar keeps for a peculiar burying place. The Founders and Endowers of theſe private Chappels could, at their pleaſure, have recalled the Foundations, and inverted the ſame to their own private uſe. (*a*) But this priviledge was not competent to their Heirs. (*b*)

(a) *Bengæus de Beneficiis ad Verba cum ſuo Reditu, Cap.* 2: *Part* 1: §: 1: *N:* 16. (b) *Ibid. Panormitan: in Cap: ad hæc de Relig: Dom: Arg: Nov:* 131: *Cap:* 10.

CHAP. IV.

An Account of the Riſe, Nature, and Progreſs of Patronage.

WHEN Patronage was introduc'd into the Church, we don't preciſely know: This much is certain, that there was no mention on't in the primitive, and pureſt times of Chriſtianity. During the firſt Three Centuries, the devouter part of Mankind appear'd mighty forward to ſignalize themſelves by extraordinary

nary Acts of Piety and Charity. Many sold their Estates for the maintainance of their Ministers, and relief of the poor. But as Men began to slack their Hand in point of Liberality to the Church; the politick of complimenting the Founder or Benefactor of an Ecclesiastick Erection with the shining Title, and tempting priviledges of Patron, was contriv'd for reviving and keeping up the wonted Fervour. Which priviledges were introduc'd by the Canons of the Church, Rescripts of Popes, and Constitutions of Princes, not all at once, but by Degrees. (*a*)

2. The Patron had a splendid Seat and Burial place in the Church; a Right of precedency among the Clergy, in solemn processions, Visitations, and the like; his Name and Arms were engraven upon the Entry, or Walls of the Church, and upon the Bells, Chalices, and other Utensils; and himself was particularly minded in the publick prayers of the Church. (*b*)

3. Patrons had the Disposal and Application of the Fruits of the vacant Benefice. (*c*) Which was taken from them by the 20 *Act* 1 *Sess. Parl.* 1644, and stated in the Presbytery and Parish. Since the Rescinding of which Act, the Parliament have taken to themselves, to order the Application of vacant Stipends to

(a) *Fr: de Roye ad Tit: de Jure Patronat: Prolegom: Cap:* 2: (b) *Idem de Juribus Honorificis in Ecclesia, Lib:* 2: *C:* 3: *Park on Patronage, Sect:* 2: (c) *C: in quibusdam* 12. *Extr: de Pœnis: De Roye ad Tit: de Jure Patron: Proleg: C:* 34.

pious

pious Uſes. (*a*) Sometimes again the Synod is impower'd to collect, and to make the Application with conſent of the Heretors. (*b*) But now Proteſtant Patrons have the power of applying vacant Stipends, except thoſe in the Synod of *Argyle*, to pious Uſes within the Pariſh: Which even ſuch as are Popiſh may do, by advice and appointment of the Presbytrie. (*c*)

4. Patrons had alſo ſome indirect Intereſt in their Benefices, where the Miniſters had modified Stipends within the worth of their Benefices. From whom the Patron at his preſenting them us'd to procure Tacks in a confident Perſon's name, to his own behoof, for payment of the accuſtomed Stipend; Whereby he carried the Superplus profit of the Benefice, and the Patronage reſolved in a Title of the Tithes. This was not quarrelled as a *Simoniacal* Paction, or Dilapidation: (*d*) But any condition made with the Patron, whereby the Intrant did not reſerve to himſelf a ſufficient Maintenance, anſwerable to the State of the Benefice, was accounted *Simoniacal*, and probable by the Parties Oath. (*e*) Albeit *Regulariter nemo tenetur jurare in ſuam turpitudinem.* Patrons have now Right by Law, to the Excreſce of the Tithes of the Pariſh not affected with

(a) *Act* 52. *Seſſ*: 1. *Parl*: 1. *Ch*: 2. *Act* 18. *Parl*: 1. *Ja*: 7. *Act* 23. *Seſſ*: 2. *Parl*: *W. and M.* (b) *Act* 24. *Seſſ*: 2. *Parl*: *W. and M.* (c) *Act* 23. *Ibid.* (d) *Act* 1. *Parl*: 21. *Ja*: 6. *Act* 9. *Parl*. 1. *Seſſ*: 1. *Ch*: 2. *Stair Inſtit*: *Lib*: 2. *Tit*: 8. § 35. (e) *D. Act* 1. *Parl*: 21:

civil

civil Titles, after the Minister is provided with a legal Stipend. (*a*)

5. The Church was to fix an Aliment upon the Patron, if reduc'd to poverty: (*b*) Even as by the civil Law manumitted Slaves were bound to maintain their former Masters, that had not otherwise whereupon to live. (*c*) But this Point hath never been *Sub Judice.* (*d*)

6. No benefic'd person without consent of his Patron cou'd do any thing material, such as the granting of Fews, or setting of Tacks, for more than three years. But the Patron consenting thereto was not lyable in Warrandice.

7. The main Priviledge that Patrons injoyed, was a power to present within a determined time an Incumbent to the Vacant Benefice: To whom, if a fit person, the Church behov'd to give Collation or Institution. (*e*) In Popish times our Princes had the nomination to Bishopricks, and Abbacies; And the Pope had the provision. (*f*) Other Kings who had this Priviledge, failing to nominate within six Months, the Pope got the free disposal of the Benefice; or he might refuse unfit persons presented, and put them to a new Nomination

(a) *Act* 23. *Sess*: 2. *Act* 26. *Sess*: 4. *Parl*: *W. and M.* (b) C. *nobis* 25. *Extr*: *de jure patronat*: C. *quicunque* 16. §. 7. *Duaren de S. Eccles*: *Minist*: *& Benef*: *lib*: 5. *cap*: 4. *Bengæus de Benefic*: *ad verba cum suo reditu*, *cap*: 4. *p*. 1. §. 5. *N*. 9. (c) *l*. 5. §. 19. *ff*. *de agnosc*. *& Alend*: *liber* (d) *Stair Instit*: *lib*; 2. *Tit*: 8. § 35. (e) C. *decernimus* 16. §. 7. C. *illud de jure patronat*: C. *ex insinuatione Eod*. (f) *Act* 125. *Parl*: 7. *Ja*: 5.

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to be expede within three Months. But our Law own'd no *jus devolutum* in favours of the Pope, to the prejudice of the Sovereign, who might have presented at all times. (*a*)

8. Mr. *Selden* (*b*) asserts, That Lay Patrons once challeng'd the Right of Collation or Investiture, which they usually reserv'd in the Foundations; And upon every Vacancy conferr'd possession of the Glebe, and Tithes, upon the new Intrant, by some Symbol or Seasine. The late Bishop of *Worcester* (*c*) alledges that some such thing was indeed aim'd at by Patrons, to keep the Clergy in a sole Dependance upon themselves, but never obtained: Tho the Practice is often complained of in the Canons of the Church. But Sir *George M'kenzie* (*d*) thinks that Patrons were in the Exercise of that priviledge, for some Ages after *Charles Martels* Government: And that the Clause with us, reserving to them power to retain the Vacant Stipends of the Benefice, is a vestige of their old pretension.

9. Presentation to a Benefice before it vaked, was not allowed: (*e*) Except where the Incumbent through Age and Bodily Infirmities was render'd incapable to serve the Cure; In which case he us'd to get a Helper joyn'd to him. (*f*) Nor was a Patron found to

(a) *Act* 85. *Parl*: 11. *Ja*. 3. (b) *Hist: of Tithes chap*: 6. *N*. 3. (c) *Eccles*: *cases relating to the Rights and Duties of the Parochial Clergy, pag*: 162 *and* 163. (d) *Observ*: *on the* 7*th*. *Act* 1 *Parl*: *Ja*: 6. (e) *C*. *ult*: *Extr*: *de conces*: *Prebend*: *D' Epeisses de Benef*: *Eccles*: *Tom*. 4. *Tit*: 3. *N*. 27. *F*. *de Roye ad Tit*: *de jure Patronat*: *Prolegom*: *cap*: 23. (f) *Carpzov*: *jus Consistor*: *lib*: 1. *tit*: 2. *def*: 15. *N*: 7. *& seqq*:

have

have power to grant a Presentation to one, and to another after his decease. (*a*) For if he the Patron might substitute one person to the Incumbent, he might substitute an hundred, and so exclude all his Successors. But in the Court of *Rome*, it is an ordinary thing, to issue forth several Bulls for one and the same Benefice, even while it is full, called *Gratiæ Expectativæ*; which is a vile and abominable practice. No Ecclesiastick Patron cou'd present himself to the Benefice. (*b*) Some require that the party presented shou'd have all the Canonical Qualities of a benefic'd person, from the very time that the Benefice vaked: Others distinguish betwixt a Right of Patronage which by the Foundation carries power to present any sufficient person in general, and that whereby the Patron is tied up to one of such or such a Quality, or Circumstances; thinking it necessary in the last Case, for the presented party to have the requisite Qualities when first the Vacancie commenc'd, and sufficient in the first Case, that he be qualified at the time of the presentation. (*c*)

10. The time was when most of the Burghs in *Scotland* had but one Minister, who was under the influence of anothers Patronage too; But at length the more considerable have raised Funds of Stipend to second Ministers, part-

(a) 24 *January* 1677. *Stuart contra Nairn.* (b) *C. per nostras* 26. *Extr: de jure patronat D' Epeisses Ibid N.* 25. *Bengæus de Beneficiis ad verb: concessa cap. ult: N.* 2 & 3. *G. Tholosan: Syntag: part* 2. *lib:* 17. C. 4. *N.* 9. *Zoes: ad Tit: X. de jure patronat: N* 33. (c) *F. de Roye Ibid. cap:* 26.

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ly out of the common Good, and partly by the Contribution of the Inhabitants; Reserving ordinarily in the Erection the Patronages to themselves. Which secures against the pretences of the Patron of the first Minister. (a) But the Patronage and power of presenting a second Minister, was found to accresce to the Patron of the first Minister; Albeit the second Ministers Stipend was a voluntary Contribution of the Heretors: Seeing the same was established only by an Act of Presbytrie, which did not mention any Reservation of the patronage, or that the Contributers did protest for it, and there was nothing of custom or possession to instruct the meaning of parties. (b) When there are more Patrons to a Church than one, they present by turns. (c) And if one of three conjunct Patrons succeed to another, he must present twice, where the third presents but once. (d) Some alledge that by presenting *Trina Vice*, or the three last times, one of several conjunct Patrons acquires a preferable Right exclusive of the rest. (e) But with us, that doth only operate a possessory Right in a competition with other Patrons *pro eâ vice*, without prejudice to the rest to declare their Right for the future. (f)

11. It hath been disputed, if a Protestant

(a) *Stair Instit: lib: 2. tit: 8. §. 27.* (b) *November 18. 1680. Town of Haddingtoun contra the Earl of Haddingtoun.* (c) *C. ult: de jure Patronat: in Clementin: D' Epeisses de Benef: Eccles: Tom 4. Tit. 3. N. 9.* (d) *Zoes: ad Tit. X. de jure Patronat: N. 54.* (e) *Vid: de Roye Ibid: cap. 16.* (f) *M'kenzies Observ: on the 7th. Act. Parl: 1. Ja: 6.*

Patron

Patron ought to be allowed to exerce his Right of Patronage in a Popiſh Country? 'Tis alledg'd for the Affirmative, that Patronage is not a perſonal, but a real Right, ordinarily annex'd to Lands, and conſequently ſhould follow them, without regard to the Quality of the perſon. And beſides, the Preſentation is but a Servitude upon the Benefice, and not a Spiritual Title. (*a*) Nor doth the Preſentation properly give the Benefice without Inſtitution from the Church upon the Letters of Preſentation; And in that the Spirituality doth really conſiſt. 2. The Church may refuſe theſe preſented if they be not qualified; So that the Patrons cannot, if they would, abuſe their Right; Nor can the Church receive any prejudice, if the Ordinaries diſcharge their Duty.

Theſe who are for excluding Patrons profeſſing the Reformed Religion, from the Right of preſenting to Popiſh Benefices, do back their Opinion with theſe Reaſons. 1. Tho Patronage be not properly a thing Spiritual, 'tis at leaſt mixt; or, as they ſay, *quid ſpirituale annexum temporali.* 2. Patronage is a Right whereof the due Exerciſe requires ſome perſonal Qualifications. Grant that the Biſhop is free to accept, or reject him who is preſented, and is Judge of his Capacity; that is not enough: For the Biſhop can only judge of Defects that are known to him. And it may be the Proteſtant Patron may preſent a very capable Man,

(a) *Carpzov: jus conſiſtor: lib: 1. tit. 2. Def: 13. N. 5. & 6.*

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but who may be under ſecret Ingagements with himſelf to ruine the Church. *Proteſtant* Lay patrons in *France* heretofore, (when Hereticks as they call 'em were ſuffer'd to injoy their Eſtates) were allowed to depute fit perſons to preſent for them to the Benefice of their *Patronage*. But now the Ordinaries in full Right confer ſuch Benefices, ſo long as the *Patrons* make profeſſion of the Reformed Religion. During which time the Right of *Patronage* is dormant, and revives upon their being reconcil'd to the Church. With us Patrons, if they be Proteſtants, are allowed to imploy the vacant Stipends for pious Uſes within their reſpective Pariſhes: And if Popiſh, that muſt be done by the advice and appointment of the Presbytrie. (*a*)

12. During Presbyterian Church Government, Preſentations were made to the Presbytrie, upon which, if admiſſion was refus'd to the party preſented; The Patron might have appeal'd to the Synod, and from them to the General Aſſembly. (*b*) In time of Prelacy, when the Biſhop would not give Collation to the perſon named by the Patron, he might have applyed to the Arch-biſhop, and if he gave no Redreſs, the next Remedy was to procure Council Letters for charging the Ordinary to receive the party preſented. But it was a relevant Objection againſt his Admiſſion, that by a *Simoniacal* paction with the Patron,

(a) *Act* 23. *Seſſ*: 2. *Parl*: *W.* & *M.* (b) *Stair Inſtit*: *lib*: 2. *tit*: 8. §. 35.

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he had not reserv'd to himself a sufficient Maintainance. (*a*) Nor was the Bishop oblig'd to receive an Expectant, who was not an actual Minister: (*b*) Because *non constat* that such a one is qualified.

13. By the Canon Law, if the Patron did not present within the legal space, there was allowed an orderly Gradation *jure devoluto*, from Inferiors to Superiors, up to the Pope. But our Law gave the Pope no *jus devolutum*, to the prejudice of the Soveraign. (*c*) The Patron not making use of his time, the right of presentation fell *jure devoluto pro eâ vice*, to the Church; That is, to the Presbytry, when the Ecclesiastick Government lodg'd in the hands of Presbyters. (*d*) And to the Bishop in time of Prelacy. (*e*) But that Term which Patrons had for presenting did not run from the date of the Vacancy; but from the time that he came to know of it. (*f*) Nor were private persons hinder'd from abridging the time, tho they cou'd not prolong it, by Transaction, or particular Clauses in the Foundation Charters. (*g*) I have sometimes observ'd the *jus devolutum*, or Law of *Lapse* provided and qualified in the Foundation Charter by a Clause establishing the right of presentation in favours of certain persons *primo loco*,

(a) *Act* 1. *Parl*: 21. *Ja*: 6. (b) *Ibid*: *M'kenzie observ*: *on the* 7*th*. *Act Parl*: 1. *Ja*: 6. (c) *Act* 85. *Parl*: 11. *Ja*: 3*d*. (d) *Act* 115. *Parl*: 12. *Ja*: 6. (e) *Act* 1. *Parl*: 21. *Ja* 6. (f) C. *quia diversitatem* 5. *in fin*: *Extr*: *de conceff*. *prebend*. C. *licet Magister* 3. *Extr*: *de Suppleud*: *Neg*: *Prælat*; *Act* 7. *Parl*. 1. *Ja*: 6. (g) *De Roye Ibid*: *cap*: 28.

and

and allowing others to present, if these neglect to do it within such a time. The Reasons for introducing this *jus devolutionis* were, 1. To hinder a long Vacancy of the Benefice, which is prejudicial to the Church. (*a*) *Nam interim gregem dominicum lupus Rapax invadere possit.* (*b*) 2. The Rights of the Church might perish by long wanting an Administrator. 3. If the Patron were left at Liberty to present when he thought fit, possibly he wou'd never do it, that he might alwise have the disposal, and application of the Fruits of the Benefice during the Vacancy. And farther, it seem'd to be the Interest of the Common-Wealth, so to restrict and tie up the Patron: As in the civil Law, the Heir institute neglecting to Implement the Defunct's Will within Year and Day, the Heretage falls to the Substitutes, or Co-heirs, or others honoured in Testament. (*c*) And a Mother neglecting to seek Tutors for her Children, is excluded from succeeding to them in their Estate. (*d*)

14. If the Church refus'd to admit a qualified Minister presented by the Patron, he might retain the Fruits of the Benefice in his hands. (*e*) Not as if he cou'd appropriate the vacant Stipends to himself; since that were a kind of Sacriledge: But only apply them to pious Uses. (*f*) Wherein Patrons have frequently been

(a) *C. quam sit 6. de Electione in 6.* (b) *C. ne pro defectu 41. Extr: de Electione.* (c) *Authent: hoc amplius C. de fidei commiss.* (d) *L. 2. §. 23. ff. ad Sctum Tertyll.* (e) *Act 115. Parl: 12. Act 1. Parl: 21. Ja. 6.* (f) *M'kenzie Observ: on the Act 7. Parl: 1. Ja: 6.*

determined by Acts of Parliament. (a) And once with certification, that the Not-observance should inferr the loss of the Right of Presentation for the next Vice; Except where the King was Patron. (b) But these Acts are not to be extended to the Stipends of second Ministers within Burghs, or other Stipendiaries, who are not pay'd out of the Teinds. When the Patrons presentation was withstood or oppos'd, he had power to retain the Fruits of the vacant Benefice: But not while he was *in morâ* of presenting. (c)

15. The Patrons presentation to a Benefice affords *jus ad rem*, and Action for wrongous Intromission, to the party prefer'd: But *jus in re* comes only by Collation and Institution, which must be perform'd by the Church. (d) Unless where the Presentation is made to a *Sine Cure*, or Benefice having no Cure of Souls, as Provostries, Prebendaries, *&c.* In which case no Collation or Institution is necessary. (e) As when a Bishop is Patron himself, and conferrs *pleno jure*, there is no Presentation, but only Collation: (f) Tho that be an improper kind of Patronage. But then, when Canonical Presentation was said to give *jus ad rem*, that had not altogether the same Effect in Ecclesiastick and Laick Patrons; For Pre-

(a) *Act* 52. *Sess*: 1. *Act* 23. *Sess*: 3. *Parl*: 1. *Ch*: 2. *Act*. 18. *Parl*: 1. J 7. *Act* 23. *Sess*: 2. *Parl*: *W & M*. (b) *d. Act* 18. (c) *Stair Instit*: *lib*: 2. *Tit*: 8. §. 35. (d) *M'kenzie Observ*: *on the 7th Act* 1. *Parl*. *Ja* 6. (e) *December* 11. 1632 *L. of Lugdoun contra Edmistoun, Stair Ibid* §. 28. (f) *July* 4. 1627. *M'kenzie Minister at Sclait contra his Parishoners*.

tentation

sentation by a Churchman was valid and effectual from the date, but a Laicks Presentation was *in pendenti*, and revokable: *(a)* The latter, and not the former, being allowed to vary in his choice.

16. The Incumbent could not be remov'd from the Benefice, tho the Patrons Right upon whose presentation he was admitted came to be afterwards reduc'd; If the Patron, was in possession. *(b)* Now, he is said to be in possession of a Right of Patronage, who hath but once *bona fide* presented. *(c)* Nay, a presentation by an appearand Heir, (who was denuded of his Predecessor's Estate, and the Right of Patronage by expired Apprisings) upon which Collation, Institution, and Possession had followed, was found to give the Minister sufficient Right to the Stipend, and all the Profits of the Benefice. For, albeit the Appryers had Right to the Patronage, The Minister only, who was actually serving the Cure, could claim the Casualities of the Benefice, by vertue of his Presentation, Collation, and Institution, standing unreduced. *(d)*

17. Presentations being at length consider'd as an Evil, and Grievance in the Church of *Scotland*, and a Popish Custom, condemn'd by Acts of the General Assembly, as prejudicial

(a) *F. de Roye ad Tit: X. de jure Patronat: Prolegom:* C: 22. (b) *C. consultationibus* 9. *Extr: de jure Patronat: Reg: Majest. lib.* 3. C. 33. *N.* 5. (c) *Mascard. de probation: conclus.* 958. *Carpzov: jurisprud: consist: lib:* 1. *tit:* 21. *def:* 2. *N.* 9. (d) *January* 1682. Mr. *James Strachan against Jean Forbes, and others the Vassals of his Parsonage.*

to the Liberty of the People in the free planting of Churches, and calling of Miniſters: It was reſcinded and taken away by the 39*th*. Act Parl. 1649. In lieu whereof the Patrons got the Heretable Right of the Tithes of their Benefices, that remained over and above the Miniſter's Stipends; with the burden of future Proviſions, and Augmentations, Tacks and Prorogations; and Redeemable by the Heretor at ſix years Purchaſe. Patrons were reſtored to the power of preſentation by the 9*th Act*, 1. *Parl.* 1. *Seſs. Ch.* 2. But the ſame is now again diſcharged, and the calling of Miniſters ordain'd to be by the Proteſtant Heretors and Elders of the Pariſh: Who are to propoſe the perſon called to the whole Congregation, to be Approven, or Diſapproven by them, for Reaſons to be cognoſced by the Presbytrie. If a Call be not thus given within Six Months after the Vacancy, the Presbytry may plant *jure devoluto*; without prejudice to call Miniſters to Royal Burghs, by the Magiſtrates, Town-Council, and Kirk-Seſſion; with whom if a part of the Pariſh be in Landwart, the Heretors and Liferenters thereof muſt concurr. For which aboliſhed Right of Preſentation, the Patron got 600 Merks, payable by the Town-Council for Burghs; and the Heretors and Liferenters in Country Pariſhes effeiring to their Valuations, two parts by Heretors, and a third by Liferenters, deducing the Patron's own proportion as an Heretor. Tithes alſo not heretably diſponed, were given to Patrons as a farther Recompence for the Right of Preſentation;

ſentation; but with the burden of Tacks and all their natural burdens, and redeemable by the Heretors at ſix Years purchaſe after Valuation. (*a*) And this Benefit of the Tithes in lieu of the preſentation taken away, was extended to the *Patrons* of all *Parſonages* and other Benefices, with the Burden foreſaid; And farther, of two Miniſters in one *Pariſh*, if the Commiſſion think fit: *Providing* the beneficed Miniſter in poſſeſſion continue ſo, until the *Patron* provide a Legal Settlement upon him of a juſt Stipend. (*b*) But it was found by the Lords of Commiſſion, (*c*) That a *Patron* cou'd not claim the Superplus of Tithes, deducing the proportion pay'd to the Miniſter: Where the whole Stipend was not pay'd out of theſe Tithes, and alſo exceeded the value of them. A *Patron* having in the year 1628 aſſign'd an Heretor to a Tack of his own Tithes, and to all other Right which he the *Patron* had, or might have thereto in time coming; The *Patron* was found oblig'd to communicate not only Tacks of Tithes and conventional Rights; but alſo his Right to the Tithes obtained by the Supervenient Act of *Parliament* 1690. (*d*) Becauſe this is not the Caſe of a Supervenient Right dropping from the Clouds, which could never have been dream'd of; but the formal Conſtitution by Statute of an heretable Title to the

(a) *Act* 23. *Seſſ.* 2. *Parl. W. & M.* (b) *Act* 26. *Seſſ.* 4. *Parl. W. & M.* (c) *In the Caſe of Sir John Scot of Ancrum, againſt Sir Walter Riddel of that Ilk, and the other Heretors of Hunam.* (d) 3: *December* 1698. *the Laird of Allardyce againſt the Viſcount of Arbuthnot.*

Tithes

Tithes in favours of the Patron, who before had near the Equivalent materially, and in effect by anticipating Tacks: And the Stile of Presentations expresly bore Assignation to the Tithes, which implyed the Cedents pretence. Nor is it the case of a conjectural Accrescence from the consideration of the Onerous Cause, or when only a particular Title, or any Right the Disponer actually hath at the time is made over: But where the accrescing of future Rights was expresly in view. 2. These future Rights behov'd mainly to be understood of such as fell to the Patron by a superveening Law. Because the Acts against the Dilapidation of Benefices, stood in the Patron's way, to hinder him from obtaining without a publick Law, any other Right than Tacks of Tithes belonging to a Church-man. And seeing the parties had unknown Events under their consideration, there is no doubt, but, had the Patron acquired Right to the Tithes by Succession to some remote Relation, or by the voluntary Deed of some pretender; such an Acquisition would have come under the Assignation, which yet is as casual, and could be as little foreseen, as the Act of Parliament 1690.

18. 'Tis a known Brocard among the *Glossers* on the Canon Law. That *Patronum faciunt Dos, Ædificatio, Fundus.* And according to the general Opinion of Interpreters, one and the same Church may have several Patrons. As if one should build it, or but a corner of it; another bestow the Ground; a third settle a Revenue for the Ministers Maintenance:

Maintenance: All which things, say they, entitle one to a Right of Patronage. Yet some deny, that Patronage is acquired by the giving of the Ground only. (*a*) But then all own, that even the Rebuilder of a demolished Church has a Title to the Patronage on't. And as to the first builder, that his Right falls, if acquir'd only by the building: But that if he also had endowed the Church, he becomes a conjunct Patron with the Rebuilder. (*b*) While the Parish Minister, in ancient times, subsisted upon the free Oblations of the people; those were then so large, and considerable, that some persons built Churches on their own Lands, to have a Share of them. Whence one of the *Spanish* councils (*c*) held about the Year 570 forbids, with great Severity the consecration of Churches, built *sub Tributaria Conditione*, and not *pro Sanctorum Patrocinio*. When we say, that a Right of Patronage is acquir'd by Dotation, that is to be understood of a competent Endowment: For he who bestows something that is not a sufficient maintenance for the beneficiary, doth not become Patron; but is only stiled a benefactor. (*d*) But then severals concurring and contributing at the same time, tho unequally, by whose joint contribution a competent Endowment is made up, are understood to be conjunct Patrons. (*e*)

(a) *Fr. de Roye ad Tit. X. de Jure Patronat. Prolegom. Cap.* 13. (b) *Ibid. Cap.* 14. *Zoes. ad Tit. X. de Jure Patronat N.* 6. (c) *Concil. Brocar.* 3. C. 6. (d) *Garcia de Beneficiis, Tom.* 1. *P.* 5. *C.* 9. *N.* 52. (e) *Ibid.*

18. The

19. The Emperor *Zeno* permitted the Founders or Endowers of Benefices, to insert any Laws or Statutes in the Foundation Charters they pleas'd, (*a*) for Administration of the Rents; according to the Rule of Law, *Quilibet rei suæ Legem dicere potest quam velit.* (*b*) and these Fundamental Laws did sometimes respect the person, on whom the Benefice might be confer'd, *viz.* That he should be of such or such a Nation, Family, Condition or Quality. (*c*) Which must be observ'd even in the case of a Lapse, by the Superior, to whom, *Jure Devoluto*, the power of presenting accrescth. (*d*)

20. The Right of Patronage hath been sometimes simply renounc'd by the Founder or Endower of a Church; and sometimes only reserv'd as a Temporary Right for a limited Degree of Kindred; which failing it ceas'd. From thence some conclude, that Patronage is competent *ipso facto*, tho not expressly reserv'd, if not renounc'd in the Foundation Charter. (*e*) But others (*f*) think an express Reservation is necessary: Because *Jus Patronatus est Servitus Libertati Ecclesiæ imposita*; and Servitudes are never presum'd in Law. Those who contend, that Patronage

(a) *l.* 15. *Cod. de SS. Ecclesiis.* (b) *l.* 20. §. 1. *ff. de Pactis Dotal.* (c) *De Roye ad Tit. X. de Jure Patron. Cap.* 25. (d) *Zoes. ad Tit. X. de Præbend & Dignitat. N.* 22. (e) *Garcia, Ibid. N.* 62: *& seqq. de Roye ad Tit. de Jur. Patron. Prolegom Cap.* 15. (f) *Bengæus de Benefic. ad Verb. cum suo Redit. Cap* 4. *P.* 1. §. 6: *N.* 4. *Hope in the Lesser Practicks, Mackenzie Observ. on the Act* 7. *Parl.* 1. *J.* 6:

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is acquir'd *ipso facto* by the building or doting of a Church, tho not reserved in the Foundation Evident, will by no means allow the same to be a Servitude. Because they alledge it was a priviledge freely introduc'd by the Church out of a principle of Gratitude, by way of Remuneration for pious Liberality. 2. *Nulla Servitus imponi potest Loco Sacro, Sancto, & Religioso.* (*a*) O! but say these of the other Opinion, at that rate, all Churches wou'd be under patronage, having been built and endow'd by some body: And yet we find, that many are free. The Answer given is, that some Patrons lost their Right *non utendo*, and by prescription; others renounc'd it at the Foundation. However we find Churches before the Reformation to have been so generally under patronage, that none were presum'd free; and the Popes Right as universal Patron was sustain'd, when no body else could instruct a Title to the patronage: As after the Extirpation of Popery, the King *Jure Coronæ* was accounted Patron, if another did not appear. For at the Reformation, as *Hope* (*b*) observes, all patronages belonging to the Pope, were, by the Act of Parliament abolishing his Authority in *Scotland*, established in the Kings person: And these pertaining to Bishops, Abbots, and Priors, his Majesty acquir'd Right thereto by mere custom.

21. All Rights of patronage were original-

(a) *L. 14 in fin: ff. de Servitut: de Roye Ibid: cap: 5.* (b) *Practicks tit: Kirks and Benefices.*

ly

ly of the ſame kind and nature. But came at length to be diſtinguiſhed into Eccleſiaſtick and Laick. The former are thoſe belonging to Church-men as ſuch, that is, upon the account of the Eccleſiaſtick Benefices they poſſeſs. For any Right of patronage a churchman enjoys *tanquam quilibet*, or *Jure Hereditario*, is called Laick patronage. Under the Denomination of Eccleſiaſtick patronage, I comprehend ſuch as hath flowed from the King ſince the Reformation, as come in place of the Pope. Prelates were not properly Patrons, with reſpect to their Menſal, or common Churches. For in the former, (which they planted as Dioceſans, and ſerved by Vicars) they, as Titulars, got the Fruits of the Benefice, and the Incumbent but a Stipend; now a Right of patronage doth not carry the Rents, but a ſimple *Jus Præſentandi*: And in the latter, the Biſhop did not preſent, but confer, *pleno jure*, by collation and inſtitution, a full Right to the Benefice; whereas Eccleſiaſtical patronage is properly a Right of preſentation to a Church within anothers Diocy, where the ordinary of the place muſt give collation. And therefore, when a Biſhop acquired the patronage of any Church within his own Diocy, it became free, and was confer'd by him *pleno jure*; ſince he could not preſent to himſelf. But then, the perſon collated in that caſe was no Stipendiary, (if his predeceſſors were not ſuch before the Bi-

(a) *De Roye ad tit. de jure Patronat.*

ſhops

ſhops Right;) but had Right, as Parſon or Vicar, to the full benefit of the Fruits, except in ſo far as reſtricted by lawful Tacks. The Lords of Erection, after the Reformation, got frequently the Gift of patronages ingroſſed in their charters of Church Lands, and tho the ſame did not bear Rights of patronage expreſly; yet they exerc'd them, and acted as Patrons. Which was quarrelled by the King, but the point of Right hath never been determined by a legal Deciſion.

22. Laick patronages are ſuch as the King diſponed before the Reformation, or Laicks have founded ſince. And even theſe require to be conſtitute upon a Signature from the Sovereign. (*a*) Lay-patronages were firſt ſet up by *Juſtinian*, upon which a baſe Merchandize hath followed; and nothing hath more defil'd the Houſe of God. (*b*) Some Laick patronages pertained to the King *Jure Privato*, *qua* Founder or Endower of the Benefice, or as being purchaſed from private perſons; or as the pertinents of Lands or Baronies fallen in his Majeſties hands by Recognition, or Forfeiture, as the patronage of the provoſtry of *Lincluden* by the Forfeiture of the Earl of *Douglaſs*, the patronage of the Colledge Church of *Dumbar* by the Forfeiture of the Earl of *March*, the patronage of the provoſtry of *Kirkhugh* by the Earl of *Fife*'s Forfeiture. Sir *Thomas Hope* (*c*) is of Opinion,

(a) *Mackenzie Obſerv. Ibid.* (b) *B. Burnets Hiſt. of the Rights of Princes, Chap.* 4. (c) *Pract. Tit. of Kirks and Benefices.*

that

that all Laick patronages in *Scotland* did once pertain to the King, and were transfer'd by him to the Subjects. In fortification whereof he alledges, 1. That when King *Malcom Kenmure* diſponed all his Lands to his Subjects, reſerving only the caſualities of Ward and Marriage, he diſponed alſo to them, at the ſame time, all patronages within the compaſs of the Lands convey'd. And the rather, becauſe all Biſhopricks, Priories, and Abbacies then in *Scotland* had been founded by King *Malcom* and his predeceſſors: Whereby they had power to reſerve the patronage to themſelves, and to erect ſmall Benefices. 2. That all the Lands, Churches, and Tithes in *Scotland* belong'd to the King during Paganiſm. And whatever the Pope attain'd to, or became Maſter of after Chriſtianity got Footing, did flow from the King, qualified with ſuch conditions and Reſervations as his Majeſty thought fit. The patronage of all Biſhopricks belong'd to the King. The Chapter us'd indeed the Formality of Election: But cou'd not pitch upon any, ſave him the King recommended, he always being an actual Miniſter of the Church. The Election gave Right to the Spirituality of the Benefice; But the Temporality was not conferr'd without a charter from the King, after conſecration: For which the Biſhop conſecrate behov'd to do Homage, and ſwear the Oath of Allegiance before Intromiſſion. (*a*) All patronages formerly belonging

(a) *Act* 1. *Parl.* 22. *J.* 6.

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to Biſhops, are now in the Queens perſon, by the Suppreſſion of that Order: And tho they were not Patrons of their own Menſal Churches, yet her Majeſty is. She is alſo Patron of all common Churches, ſince the Diſſolution; except ſuch as were diſponed by her Royal predeceſſors to private perſons. As for Colledge Churches, Chaplainries, and Altarages, theſe are under the patronage of their particular Founders, and their Succeſſors: But the Queen is Patron of moſt of the Colledge Churches. Patrons of Provoſtries, Prebendries, Chaplainries, and Altarages holding of the King by Infeftment, are allowed to preſent the ſame to Burſars in Colledges at their pleaſure: (*a*) And declared Superiors *quoad* the Entry of Vaſſals of the ſaid Benefices. (*b*) But this is not to be extended, in the Opinion of the Lord *Dirletoun*, (*c*) to ſuch as are Patrons by ſimple proviſion in the Foundation, nor yet to Eccleſiaſtick Patrons. (*d*) Yet Sir *James Stuart* her Majeſties Advocat, in his excellent Notes upon *Dirletouns* Doubts, will have the Act comprehend Eccleſiaſtick, as well as Laick patronage: The principal reaſon of the Act being, that Chaplains are out of uſe. Tho, at the ſame time, he wiſely ſuggeſts the conveniency of making an Act of Parliament to clear all theſe Niceties, whereby property may be any wiſe incumber'd. The 29. *Act*,

(a) *Act* 12. *Parl.* 1. *Act* 158. *Parl.* 12. *J.* 6. (b) *Act* 54: *Parl:* 1: *Seſſ:* 1: *Ch:* 2: (c) *Doubts and Queſtions in the Law, Title Altarage* (d) *Ibid. Title Chaplainry.*

Parl.

Parl. 11. *J.* 6. doth except from the Annexation, Lands belonging to *Benefices* of Laick patronage; that is, such Laick patronages as were duly established before the Reformation. (*a*) But yet Rights of Laick patronage granted before the Year 1561, were declared to fall within the compass of the general Submission, and the Kings Decreet Arbitral, in so far as concern'd a compleat Maintenance to the Minister, the Tiends of other Mens Lands, and his Majesties Annuity; and only the remanent Tithes thereof to pertain to the Laick Patrons in price, or rate, in all cases where they were in possession seven Years of fifteen immediatly preceeding the general Submission. (*b*) It was fully debated, but not decided, *November* 1677, (*c*) whether all the other patronages formerly belonging to Monastries, fell under the Annexation 1587? It was urg'd for their being annexd; That, by the first Words of the 29. *Act*, 11. *Parl. J.* 6. the Abbacies, *&c.* and all profits or Emoluments whatsoever belonging to them were annex'd, and consequently patronages: Especially considering, how much it was the Interest of King and Parliament, to have these depend upon the Crown, for preventing the malign Influence of private Schismatick Patrons. 2. In the Reduction drawn by Sir *Thomas Hope*, all Rights made to the Lords of Erection of patronages formerly pertaining to Monastries, were crav'd

(a) *Mackenzie Observ. upon the Act* 7. *Parl.* 1. *J.* 6. (b) *Act* 19. *Parl.* 1. *Charles* 1. (c) *In the case of Stuart against the Laird of Watertoun.*

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to be reduc'd as contrary to the Act of Annexation. Upon which Reduction the Erection-Lords ſubmitted their Rights to theſe patronages, and the King, in his Decreet Arbitral, determin'd them to have only Right to the converted prices of the Feu-Mails of their Superiorities, *&c.* 3. It was alſo contended, that the patronages were annex'd by the 13. and 14. Acts of the firſt Parliament, *Ch.* 1. To all which it was anſwer'd, That patronages were never annex'd as parts and pendicles, but always *per expreſſum*, as in the Annexation of the Abbey of *Dumferling*. (*a*) And it is abſurd to think, that when the general clauſe in the Act 1587 did ſpecify the meaneſt things, as the Service of Tennents, it wou'd have omitted patronages that are of ſo great conſequence, had it been the deſign of the Parliament to have theſe annex'd. 2. If thoſe having Right to Eccleſiaſtical patronages had ever dream'd of their being annex'd, they had certainly crav'd a Diſſolution in Parliament, which no perſon ever did. Nor were patronages annex'd by the 13. and 14. Acts of the Parliament 1633, ſeing theſe do not mention them expreſly, and they cannot come under the General of *Pertinents*, for the Reaſons foreſaid. Farther, to ſhew that King *Charles* the Firſt had determined nothing as to patronages belonging to Lords of Erection, the 12. Act of his foreſaid Parliament doth bear theſe Words, *Likeas alſo the remanent points*

(a) *Act* 1587. *Parl.* 13. *J.* 6.

of

of our said Commission anent the Patronage of Kirks, &c. are not yet begun to be treated. Anno 1584, the first Fruits of all Benefices, except Laick patronages, were allotted as a partial Fund for establishing a Horse Guard to the King. (*a*)

23. The Canonists tell us of many things, wherein Ecclesiastick and Laick patronage differ. 1. They allow four Months to a Laick Patron to present in; (*b*) and six Months to an Ecclesiastick. (*c*) Which Distinction was once Law with us: (*d*) But by the *Act* 7. *Parl.* 1. *J.* 6. Laick Patrons were also allowed six Months. 2. If the Lay Patron present an unworthy person, he may pitch upon another; But an Ecclesiastick, by so doing, Forfeits his Right for that bout, and is not suffered to accumulate presentation upon presentation; ignorance being not so excusable in him as a Laick. (*e*) And that was the Reason for allowing a longer time to Ecclesiasticks, than to Laicks to present in. (*f*) But then some think the Lay Patron should not vary more than once; (*g*) others are of Opinion, that he may vary as oft as he will. (*h*) Our Law

(a) *Act* 137: *Parl*: 8: *J*: 6: (b) *C*: *cum propter* 27: *Extr*: *de Jure Patronat*: *C*: *un*: §: 1: *Extr*: *eod*. *in* 6: *Duaren*: *de* §: *Eccles*: *Minist*: *& Benef*: *Lib*: 5: *C*: 4: *Carpzov*: *Jus Consist*: *Lib*: 1; *Tit*: 2: *Def*: 15: *Les OEvres d'Epeisses de Benefices Eccles*: *Tom*: 4 *Tit*: 3: *N*: 7: (c) *Nov*: 123: *C*: 1: §: 2: *d*: *C*: *un*: §: 1: *C*: *eamve* 22: *Extr*: *de Jure Patronat*: *Duaren*: *Ibid*: *Carpzov*: *Ibid*: *d Epeisses*: *Ibid*: (d) *Regiam Majest*: *Lib*: 1 *Cap*: 2: (e) *Bengæus de Beneficiis ad Verb*: *cum suo Reatu*. *C*: 4. *Part*: 1: §: 7: *N*: 10: *d Epeisses*: *Ibid*: *N*: 14: *&* 15: *Garcia de Benef*: *Tom*: 1: *P*: 5: *C*: 9: *N*: 211: (f) *Zoes*: *ad Tit*: *X*. *de Jure Patronat*: *N*: 45: (g) *Arg*: *l*: 89: §: 1: *ff*: *de Reg*: *Juris*: *Garcia*. *Ibid*: *N*: 214: (h) *Zoes*: *Ibid*; *N*; 48.

allowed

allowed any Patron to alter his presentation, and one being found unfit to name another; and that as oft as the persons presented were rejected: So be, all the presentations were within six Months. For one presentation within that time doth not so interrupt, as that he, the Patron, may present again within other six Months. Unless those having Right to the *Jus Devolutionis*, did hinder the presented persons Admission; who cannot pretend to any benefit by their own fault. (*a*) But then, tho a Lay Patron may again present after his first *Nominee* is rejected as insufficient; he cannot of himself recede from the first Nomination. (*b*) 3. In the case of two presented by an Ecclesiastick Patron, the first presentation was preferable. But two persons being presented by a Laick Patron, the Bishop had his Option to give collation to either of them. (*c*) 4. The Pope might prejudge an Ecclesiastick, but not a Laick patronage: (*d*) That is, at any time before the presentation *pulsaverat aures ordinarii*. (*e*) Patronage *in casu dubio*, is presumed to be Laick, and not Ecclesiastick: Because, say the Doctors, we are not born Clergy-men, but Laicks, and are still presum'd to be such, while the Ecclesiastical character is not instructed. (*f*) Lay patronages frequently turn Ecclesiastical in process of time, either

(a) *M'kenzie Ibid:* (b) *De Roye ad Tit: X. de jure Patronat: Cap:* 24. *Zoes: Ibid.* (c) *C: cum autem* 24: *Extr: de jure Patronat. Bengæus, Ibid: N.* 9: (d) *Ibid: N:* 11: *&* 12: *de Roye: Ibid: Prolegom: Cap:* 7: (e) *Ibid: Cap:* 22: (f) *Ibid: Cap:* 6:

according to the Terms of the Donation; or by the Lay Patrons making over to Churches his Lands and Eſtate with annex'd patronages.

24. By the Canon Law, altho the Right of patronage *tranſit cum Univerſitate*, unleſs it be ſpecially excepted: (*a*) It cannot be ſeparatly ſold, (*b*) as being *Spiritualitati Annexum*, and not *in Commercio*. Nay, ſome are ſo nice and ſqueamiſh in the matter, that they'll not allow Lands to be ſold any thing dearer, upon the account of annext patronage. (*c*) But with us patronages are bought and ſold in the ſame manner as any other Right. Sometimes they are tranſmitted as annex'd to Lands in charters of Burghs, Baronies, or Lordſhips; and ſometimes by diſtinct Rights, and then they paſs without Infeftment as *Jura Incorporalia*. (*d*) Yea, not only is a Right of patronage tranſmiſſible by Diſpoſition without Infeftment; but alſo it was found, that a perſon, in whoſe favours one was ordained by a Decreet Arbitral to diſpone ſuch a Right, might effectually authorize by his conſent as Patron the Deed of an Incumbent; ſo as his Succeſſor in Office cou'd not juſtly quarrel the ſame. (*e*) This Deciſion ſeem'd hard to my Lord *Dirletoun*, becauſe none can effectually conſent as Patron, who cannot preſent; and

(a) C: *ex Literis* 7. *Extr*: *de jure Patronat*: (b) C: *quia Clerici* 6: C: *de jure* 16: *Extr*: *eod*: (c) *Zoeſ*: *ad Tit*: X. *de jure Patronat*. *N*: 20: *Barboſ*: *Collect*: *Doct*: *in* C: *ex Literis de jure Patron*: *N*: 2: (d) *Stair Inſtitut*: *Lib*: 2: *Tit*: 8: §: 35: (e) *July* 6. 1666: *Parſon of Morum againſt the Lairds of Beirſoord and Beinſtoun*.

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the patronage might have been compriz'd from, or disponed by him who was ordained to denude. 'Tis true he was not so denuded by the Decreet, but that notwithstanding thereof, before obedience given, the patronage might have been compriz'd from him, or disponed to another; and that other, as having the more formal and compleat Right, would have been prefer'd. But there being no such competition, it was not thought competent to a Minister to reduce a Right granted by his predecessor, upon that ground. In the Opinion of one of our greatest Lawyers, (*a*) a Right of patronage by the Foundation, being provided to one, and not to him and his Assigneys, with a Quality, that he failing to present within a certain time, another might exerce the priviledge: The Patron institute may dispone the patronage, or it may be adjudg'd from him, notwithstanding the Substitution. Yet still so, as if the singular Successor do not timeously present in the Terms of the Foundation, the Substitute may. Where patronage is incorporate in the same Charter with Lands, Seasin of the Land is sufficient, without necessity to take special Seasin of the patronage: As petty Customs in the like case may be constitute by a Charter, without Seasin. (*b*) A Right of patronage being annext to Lands, is tacitly carried by a Disposition of these Lands; (*c*) unless it be therein special-

(a) *S: J: Stuart Queens Advocat:* (b) *July* 5: 1632: *Sheriff of Forrest contra Town of Selkirk:* (c) *D'Epsisses Tom:* 4: *Tit:* 3: *N:* 17: *Craig: Feud: Lib:* 2: *Dieg:* 8.

ly excepted: But unannex'd patronage is not ſo convey'd. (*a*) Yet Barony and Benefice being *nomina Univerſitatis*, do carry patronage as well as Milns, or Salmond-Fiſhing; and that by Reſignation, Appryſing, Adjudication, Recognition, or Forfeiture.

25. The Canoniſts hold, that a Patron may be excluded from the *Jus Præſentandi*, either for a time, or *ſimpliciter*. The Grounds for a Temporary Excluſion of a Right of patronage, or rather a Suſpenſion of the Effect on't are, 1. An Eccleſiaſtical Patron, by preſenting an inſufficient perſon, loſes his Right for that bout. (*b*) 2. Excommunication of any Patron, or his falling into Hereſy, makes his Right to ceaſe, or ſleep while he continues in that State. (*c*) And tho our Law hath taken away the civil Sting or Pains of Excommunication: (*d*) It doth not allow Popiſh Patrons to diſpoſe of vacant Stipends for pious Uſes, but by Advice and Appointment of the Presbytry. (*e*) 3. If a Patron don't apply vacant Stipends to pious Uſes within the Pariſh, except they be vacant Stipends within the Synod of *Argyle*, he forfeits to the Presbytery, his Right of Adminiſtration for that, and the next Vacancy. (*f*) Patronage is *ſimpliciter* or totally excluded by preſcription of 40 Years. (*g*)

26. The Exception of *Decennalis & Triennalis Poſſeſſio*, was not relevant againſt the Pa-

(a) *Ibid:* (b) *De Roye: Ibid: Cap:* 38: (c) *Ibid:* (d) *W. and M: Parl: Seſſ:* 2 *Cap:* 28: (e) *Ibid: Cap:* 23: (f) *Ibid:* (g) *De Roye: Ibid: Cap:* 16.

tron,

tron, in respect of the Clause in the Rule of Chancellary, *Dummodo per eos ad quos Præsentatio pertinuit, præsentati fuerint.* And by the *Act 61. Parl. 11. J. 6.* no Laick infeft in Lands with the Right of Patronage annex'd, could be prejudg'd by any long Possession of an Ecclesiastical Intruder, while the Lands were Wadset: But he Redeeming *quandocunque*, return'd to his Right of Presentation. Because, during the not Redemption, the Granter of the Wadset was not *valens agere*; and the Wadsetter did not look upon himself as Heretor. But Church-men now prescribe a Title by 40 Years uninterrupted Possession, exclusive of all Rights of Laick Patronage annex'd to Wadset Lands, as well as others. (*a*)

27. According to the Canon Law, the Right of Patronage goes to Heirs; but as a *Jus Individuum*, it does not divide among 'em: For if there be several Heirs, they are all Patrons *in solidum*, (*b*) and present conjunctly. (*c*) But with us, if Heirs Portioners succeed, Rights Individual fall to the eldest. (*d*) And even in other places, to prevent Differences among Children, the Right of Patronage useth not unfrequently to be conceiv'd in favours of the eldest. (*e*) And where that is omitted, the Children use, upon the Patrons Decease, either to decide the Patronage by Vote

(a) *Mackenzie Observ: on the Act 61: Parl: 11: J: 6:* (b) *C: perlatum 1. Extr: de jure Patronat:* (c) *Clem. 2: eod: Tit: Duaren: de S: Eccles: Minist: & Benefic: Lib: 5: Cap. 4: Zoes: ad Tit: X: de Jure Patron: N: 10:* (d) *Stair Instit: Lib: 3: Tit: 5: §: 11:* (e) *De Roye: Ibid: Cap. 9.*

among themſelves ; or agree to preſent by turns. (*a*) As in the Civil Law, Servitudes may be conſtitute ſo, as ſeverals may uſe them *alternis vicibus.* (*b*)

28. Having run over the ſeveral kinds of Benefices ; their Temporality and Spirituality fall next to be conſidered : But in order to a right underſtanding of theſe, and for our clearer proceeding in this Matter, it will be requiſite to take a previous view of the Origine and progreſs of Eccleſiaſtical Revenues in the ſeveral Ages of the Chriſtian Church.

(a) *Ibid. Cap.* 19. (b) *L.* 34. *pr. ff. de uſu fructu l.* 5. §. 1. *ff. de ſervitut.*

CHAP. V.

The Hiſtory of Eccleſiaſtical Revenues, from the Commencement of Chriſtianity, till Commiſſions of Parliament were appointed for Planting of Churches, and Modifying Miniſters Stipends.

THE Chriſtian Church poſſeſs'd no fix'd Revenues, until about the fourth Century ; except ſome Lands, or rather Fields and Gardens in *Rome*, and the greater Cities, which upon *Dioclesian's* Perſecution were ſeiz'd,

ſeiz'd, and Confiſcated. For ſuch as ſhe had before, were very uncertain and precarious; nay, rather a kind of occaſional ſubſidies gathered from the exuberant Charity of Believers: out of which Eccleſiaſtical Perſons drew only ſo much as ſuffic'd for a neceſſary Aliment; what was over being carefully imployed for Relief of the Poor, and ſuch like *Pious* Uſes. The Diſtribution and Management of this Stock-purſe of the Church, was firſt committed to the Apoſtles; (*a*) and then to Biſhops. (*b*)

2. The Emperor *Conſtantine* the Great, turning Chriſtian, chang'd the Scene, and the Church put on a new Face; I cannot ſay a better, becauſe of the inſuing Corruptions. He beſtow'd many Gifts and Favours upon the Chriſtians, and built them Churches, which he provided with Rents for an Honourable Maintenance of the Miniſters. He reſcinded all Laws and Edicts to the prejudice of Chriſtians; particularly ſuch as hindred People to beſtow Lands and Inheritances upon Churches; and ordained that they ſhould ſucceed to the Eſtates of Martyrs, or Confeſſors that died without Heirs. *Conſtantines* zeal did carry him to do every thing for the Honour of the Chriſtian Religion that he could think on. Nay, farther, as Mr. *Milton* (*c*) expreſſeth it, he was ſo Liberal a Nurſing Father to the Church, that he either overlaid,

(a) *Acts* 4. 34, 35. (b) *Socrat. Hiſt. Eccleſ. lib.* 7. *cap.* 25. (c) *Vol.* 2. *of his Works p.* 760.

or

or choak't it with his fondneſs in the Nurſing. This Serene and proſperous Seaſon the Church injoyed, ſuggeſted Fears to many prudent Chriſtian Fathers, that it might produce a decay of Piety and Vertue, which put them upon Diſputing the Lawfulneſs of accepting Lands and Poſſeſſions. Some alledged that the Exemples of our Saviour and his Apoſtles bound them to contemn the World, and to live in poverty, expecting no Reward for their Labours on this ſide of Heaven. (*a*) Others conceiv'd that Courſe to be but temporary, affirming the time was come to Crown the long ſuffering of the Church, with the Bleſſings promiſed in the *tenth* of *Mark.* (*b*) The firſt Opinion furniſhed a Pretext to *Julian* the Apoſtate, for his Revoking the Churches Priviledges, and taking away their Indowments. But his Edicts were Reverſed by *Jovian & Valentinian.*

3. When the Church came to get Lands and Rents, and to be incumber'd with Civil Affairs, an Imperial Law (*c*) was made *anno* 407, Exempting the Clergy from looking after their Cauſes, and allowing the Biſhops to conſtitute Advocats or Defenſors for their Churches and Poor; who might negotiate their Law Pleas and other Affairs. Theſe Advocats were called afterwards in *Scotland*,

(a) *L. Thomaſſin la diſcipline de l' Egliſe touchant les benefices part* 1. *liv.* 4. *chap.* 1. *&* 2. (b) *verſ.* 29. *&* 30. (c.) *Cod. Theodoſ. De Epiſcop, et Cleric, tit.* 2. *l.* 38.

The

The Biſhops Bailiffs, in *England* The Stewards, and in *France* the Vicedams.

4. The Biſhops liv'd then in a Collegiate manner with their Clergy; and had community of Goods: and the Clergy were called Canons, *quia ſecundum certos Canones vivebant.* But about the year 472, we read of a Famous Diviſion of the Rents of the Church into four parts: of which one was to go to the Biſhop, another to the reſt of the Clergy, a third to the Poor, and a fourth for the Fabrick. Which the Learned Biſhop of *Sarum* (a) obſerves to have taken place as a Rule univerſally for many Ages, all over the Weſtern Churches; except in *Spain*, where the Goods of the Church were Subjected to a Tripartite Diviſion, and the Poor excluded from any Proportion: Tho I find no Veſtige of this four-fold Partition in *Scotland.* The Canons, who got thus their Proviſion diſtinguiſhed from the Biſhops Portion, continued ſome little time after in a ſocial State, and profeſſed one Rule of Life, eating and ſleeping in the ſame Dorter and Refectory: but wearying of this, they chus'd to have their own Apartments, and to be Maſters of their own Diet. In order to which the common Revenue was ſubdivided and parcelled out among them. And they from that occaſion got a new general Name of *Prebendaries*, beſide the particular Titles of Dean, Arch-deacon, Chanter, Subchanter, *&c.* beſtowed on them upon the

(a) *Hiſt. of the Rights of Princes.*

account

account of peculiar Offices: and the distinct Localities assign'd for their Subsistence, were in the general called *Prebends*, and in particular Deanries, Arch-deaconries, Chanteries, *&c.* But then the Canons turn'd less vigilant in their Ministry, and Remiss in Discipline, neglected to Assist in the Chair, and took up their Residence where they pleas'd, tho never so remote from the Cathedral or Collegiate Body: and thereby most justly procur'd themselves to be stiled *secular Canons*. When much of the Revenue of the Bishoprick came to consist of Parish Churches annex'd, these that fell to the Bishops share, were called Mensal Churches, because his Table was maintain'd out of the Rents of 'em: and such were termed common Churches, as were allotted for the common uses, and benefit of the Chapter, and in planting whereof the Bishop with his Chapter had an united Interest.

5. It was long before the Western Church own'd any other Name save that of Bishop, as the distinguishing Character of him who had the principal Administration; And when any Bishop had Jurisdiction over others, she called him the first Bishop. The *Greeks* invented a great many new Words to express the different Offices of the Ecclesiastical State: Such as the honourable Titles of Arch-bishop, Primate, and Patriarch. But in process of time, the *Romish* Church did not only adopt these; but also the topping Characters of Pope and Cardinal were introduc'd: Whereof the one

one now a days is thought little Inferior to the Royal Dignity, and the other above it.

6. When the Ruling Order of Biſhops was firſt ſet up in *Scotland*, is not agreed on all hands. This is certain they were but a flying party, or a *Miniſterium vagum*, called *Epiſcopi Scotorum*, till *Malcolm Kenmure*'s time, who aſſign'd them particular Diſtricts, and Dioceſes. But in proceſs of time an Eccleſiaſtical Hierarchy was eſtabliſhed among us, conſiſting of two Arch-biſhops of St. *Andrews*, and *Glaſgow*; Whereof the former ſtiled Metropolitan and Primate of all *Scotland*, had under him eight Suffragan or Subordinate Biſhops of *Dunkel*, *Aberdeen*, *Murray*, *Brechin*, *Dumblane*, *Roſs*, *Caithneſs*, and *Orkney*, and for his Chancellor or Viccar, the Biſhop of *Edinburgh*: The latter had within his Province only three Suffragans, of *Galloway*, *Argyle*, and the *Iſles*. St. *Andrews* was made a Biſhoprick by *Kenneth* the Second; and the Prelate thereof inveſted with the Character of Arch-biſhop and Primate of *Scotland* by Pope *Sixtus* the Fourth. King *Alexander* the Firſt gave great Things to the Church of St. *Andrews*, particularly the *Curſus Apri*, or *Bears Reak*; and erected their Lands in a Regality. Arch-biſhop *John Hamilton* was hang'd at *Stirling* for Treaſon, (*a*) and was the only Biſhop in this Kingdom that ſuffered by way of Juſtice. The Rents of this Biſhoprick for ſome years were conferr'd upon the Earl of *Mortoun*, (*b*) in Recompence of the vaſt Charges of his Em-

(a) 1570. (b) 1571.

baſſy

baſſy to *England.* who to Legitimate his Title to theſe Rents, procur'd *John Dowglaſs* Principal of the new Colledge of St. *Andrews*, to be admitted and inſtalled Titular. King *James* the Sixth beſtowed the Profits of the See of St. *Andrews*, after the death of Biſhop *Adamſon*, upon the Duke of *Lennox*; who continued to injoy the ſame, till the Temporalities of Biſhopricks were reſtored by the Parliament 1606; and retained the Rents of the Priory till Biſhop *Spotſwood* procur'd them to be annexed to the Biſhoprick. The Provoſtry of *Kirkhugh* was united to it with ſome Exceptions, by the Parliament 1621: The Dioceſe of St. *Andrews* takes in all *Fife-ſhire*, with ſome parts of the Shires of *Perth*, *Angus*, and *Merns*. King *Charles* the Firſt founded and indowed the Biſhoprick of *Edinburgh* in the year 1633: And Dr. *William Forbes* was the firſt Biſhop thereof. *David Lindſay* his Succeſſor had like to have been ſacrific'd to the Fury of a Rabble upon the firſt reading of the Book of Common-prayer in *Edinb. July* 1637. The B. of *Edinburgh* was made (what the Biſhop of *Dunkeld* had been formerly) Suffragan or Vicar to St. *Andrews*, and Conveener of the Electors, and ſo the firſt ordinary Biſhop. His Dioceſe comprehends the Shires of *Edinburgh*, *Linlithgow*, and *Berwick*, the Conſtabulary of *Haddingtoun* and Bailliarie of *Lawderdale*. King *David* founded the See of *Dunkeld*: And beſtowed the Lands of *Auchtertuil*, with diverſe others, upon it. Biſhop *Carden* acquir'd thereto the Town of *Cramond*, with the Lands adjacent; For which he Excambed the Lands of

Muchler

Muchler and *Cambo*. Mr. *Thomas Lawder* got the Biſhops Lands on the North-ſide of *Forth* erected into the Barony of *Dunkeld*; And theſe on the South into the Barony of *Aberlady*. *Alexander Lindſay* Brother to the Laird of *Evelick* was frighten'd by the threatned Cenſures of the Aſſembly of *Glaſgow* into an abjuration of Epiſcopacy, ſubmitted to Presbyterian Government *(a)* after he had been Biſhop, and accepted the charge of a particular Pariſh. The Dioceſe of *Dunkeld* contains ſome parts of *Angus* and *Weſt-lothian*, and the Weſt part of *Perth-ſhire*. King *Malcolm* the Second in Commemoration of a Signal Victory over the *Danes* at *Murthlack* in *Angus*, founded there a Biſhoprick: Which he indowed with Rents of the Lands thereabout, viz. *Murthlack*, *Cloveth*, and *Dunmeth*. King *David* (*b*) tranſlated the See to *Aberdeen*: And inrich'd it with the Lands of Old *Aberdeen*, *Sclaty*, *Goull*, *Meercroft*, *Kurmundy*, *Mowenlach*, *Clat*, *Talynſtine*, *Rayne*, *Dawyot*, and their Churches; With diverſe others Lands. The Dioceſe of *Aberdeen* extends it ſelf through the whole Shire of *Aberdeen*, and moſt part of *Bamff* and *Merns*. *Leſly* and *Spotſwood* tell, That *Malcolm* the Third erected the Biſhoprick of *Murray*: But Sir *J. Dalrymple* doth not allow it to be ſo antient. Who was the firſt Biſhop of *Murray*, we find not; But *Binius* founded the Colledge of Canons, and *Alexander* built the Palace of *Kinneddore*. When moſt of our *Scots* Biſhops withdrew

(a) *Anno* 1639. (b) *Anno* 1142.

into

into *England*, to avoid the Storm which threatned them: *John Guthrie* adher'd to his *Bishoprick* of *Murray*, till he was put from it, and then retir'd to his antient Inheritance of *Guthry*, in *Angus*; where he died during the Civil Wars. The Diocese of *Murray* contains the Shires of *Elgin* and *Nairn*, besides part of *Inverness* and *Bamff-shires*. The *Bishopricks* of *Brechin*, *Dumblane*, and *Ross*, were all founded by King *David*. The Church of *Kincaid* was dissolv'd from *Brechin* in the year 1597, and erected in a several Parsonage, and the Patronage disponed to Sir *David Carnagy*. The Diocese of *Brechin* contains part of *Angus* and *Merns*. *Gilbert* Earl of *Strathern* gave a third of his Lands to the See of *Dumblane*. *Bishop Ochiltree* acquired to it a great part of the foresaid Lands of *Strathern*. The Chartulary or Writes of the *Bishoprick* of *Dumblane* are not to be found. Sir *James Dalrymple* conjectures they have been carried over Sea at the Reformation by *George Thomson*, or some other Churchman of that Diocese. The Temporality and Spirituality of the Abbey of *Corsregal*, and Priory of *Monimusk* was annex'd to this See in King *James* the Sixth's twenty second Parliament. (*a*) The *Bishop* was Dean of the Chappel Royal, annex'd to the See of *Dumblane* by the Parliament 1621. *Robert Leightoun* was the greatest Ornament of this *Bishoprick*: In whom most of the eminent Vertues of the Primitive *Bishops* seem'd to be reviv'd. The Diocese of *Dumblane*

(a) 1617.

consists

consists of part of *Perth* and *Stirling* Shires. *John Lesly* who wrote the History of our Nation, and had been once a Senator of the Colledge of Justice, was the last Popish *Bishop* of *Ross*. He was Embassador from Queen *Mary* to the Queen of *England;* and afterwards retired Abroad, whether probably he has carried the Writes of the Diocie. The Cathedral of *Channery*, where the *Bishops* Seat is, was demolished at the Reformation; *But* some part of it is since Rebuilt. The Jurisdiction of the Diocese comprehends the Shires of *Tayn*, *Cromarty*, and the most part of *Inverness-shire*. *Fern* was annex'd to the Bishoprick of *Ross* in the year 1617. According to *Lesly* and *Spotswood*, the Episcopal See of *Caithness* was founded by King *Malcolm* the Third; But Sir *James Dalrymple* makes that Foundation to be of a later date. The Story of the *Caithness* Bishops is remarkable, for that sad and unexempled Tragedy acted upon Bishop *Adam*. (a) *Dornoch* in *Sutherland* is the Bishop of *Caithness*'s Seat; and his Diocie comprehends the Shires of *Caithness* and *Sutherland*. 'Tis because *Orkney* was long subject to the *Norvegians*, that we have no antient Accounts of that Bishoprick. We find only four or five Bishops there, before the Reformation. *Adam Bothwel* Bishop of *Orkney* once depos'd for marrying Queen *Mary* to the Earl of *Bothwel*, was the only Popish Bishop that imbrac'd the Reformation, and continued in Office in Church and State. *George Grahame* Bishop of *Orkney* was mov'd with the Censures

(a) *Anno* 1222.

of

of the Assembly of *Glasgow* to renounce Episcopacy, and take up with Presbyterian Government. Bishop *Andrew Honyman* being in Coach at *Edinbulgh* with Arch-bishop *Sharp* in the year 1668, receiv'd a wound in his Arm by a Pistol Shot aim'd at the Arch-bishop by a person who suffer'd Death for it. *Buchanan* in his Description of *Orkney*, speaks of a strange Test that the Inhabitants put to their new Bishops at their first coming to them: Which is to drink up at one draught an antient large Cup or Goblet full; which they say belong'd to St. *Magnus*, who first taught them the Principles of the Christian Religion. He who performs it is counted a very Non-such of a Man; and they promise themselves very plentiful Cropts all his time. K. *James* the 4*th*. erected the Lands of the Bishoprick of *Orkney* into a Regality, in the year 1490. The Diocese consists of all the Northern Isles of *Orkney* and *Shetland*. Sir *James Dalrymple* informs that there was no Bishop of *Glasgow* till the Reign of King *Alexander*. King *David* bestowed the Lands of *Patrick* upon that See. *Robert Blackader* was the first Arch-bishop thereof. As for the Story of St. *Mungo*, it savours too rank of the Legend. *James Bethun* the last Popish Bishop being attainted of Treason, fled to *France* in the year 1560, with all the Ornaments, Plate, and Papers of that Church, which he lodg'd in the hands of the *Carthusians* in *Paris*: To be restor'd when *Scotland* return'd to the Church of *Rome*. *Robert Montgomery* exchang'd his Bishoprick with with the charge of a particular Parish in

(a) The Shires of *Dumbartoun*, *Renfrew*, *Air*, *Lanerk*, with part of the Shires of *Roxburgh*, *Dumfreis*, *Peebles*, and *Selkirk*, made up the Dioceſe of *Glaſgow*. St. *Ninian* is commonly called the firſt Biſhop of *Galloway* or *Candidæ Caſæ*: But ſome think more probably that he was only a private *Culdee*, or at moſt one of the *Epiſcopi Scotorum* mentioned *Chap.* 2. *N.* 3. According to Sir *James Dalrymple*'s Chronology, (b) *Chriſtianus* is the firſt Biſhop. The Biſhop of *Galloway* was Vicar to the Arch biſhop of *Glaſgow*, (c) and Conveener of the Electors. The Shire of *Wigtoun*, Stewartry of *Kirkcubright*, Regality of *Glenluce*, and ſome of *Dumfries-ſhire*, are the conſtituent parts of the Dioceſe of *Galloway*. The Biſhoprick of *Argyle* was taken off the See of *Dunkeld*, about the year 1200 by Pope *Clement* the Third, at the motion of *John Scot* Biſhop of *Dunkeld*: And erected in favours of one who could Speak and Preach in the *Iriſh* Tongue to the People of the Province, who underſtood no other Language. The Seat was appointed at *Lismore*: And the Dioceſe is made up of *Argyle*, *Lorn*, *Kintire*, *Lochaber*, and ſome of the Weſt Iſles. According to Biſhop *Spotſwood*'s Account, the firſt Seat of the *Biſhop* of the Iſles was in the Iſle of *Man*: And when the *Scots* were diſlodg'd there, it was tranſlated to *Icolmkil*. Others diſprove this. I ſhall ſay nothing of the Antiquities of that See, the Relations being ſo

(a) 1587. (b) *Collections concerning the Scottiſh Hiſtory*, p. 273. (c) *Act* 2. *Parl.* 22. *Ja.* 6.

doubtful, and different: *But* only notice that the old Evidents of the *Bi*ſhoprick were loſt, and no Veſtige remained to inſtruct how many Dignitaries were in it. Which oblig'd the Parliament 1617, to appoint the *Bi*ſhops Chapter and Council to conſiſt of the Parſon of *Sorbie* as Dean, the Parſon of *Rothſay* as Sub-dean, and four Prebends, *viz.* the Parſons of *Kilmoir*, *Cumrie*, *Kilraw*, and *Killean*. The ſaid Parliament annex'd the Priory of *Archatan*, with the Abbacy of *Icolmkil*, to this *Bi*ſhoprick.

7. It is own'd that Biſhops at firſt lived with their Clergy about them in their proper Seats, or Cathedral Churches; where the ſtated Services, and publick Offices of Religion were only performed, and to which all the People of the Dioceſe conſidered as one Pariſh reſorted, eſpecially at the more ſolemn Seaſons of Devotion; and that ſome Presbyters us'd to be ſent forth into the Remoter parts as *Itinerant* Preachers, for diſpenſing of the Word and Sacraments to ſuch as could not conveniently come to reap the Benefit thereof in the Epiſcopal College. Nor is it controverted that the Inſtitution of Rural Pariſhes got up, to the end Paſtors might notice more particularly, the People committed to their immediate care. *But* then it is not ſo clear when, or by whom, this was firſt done. Some aſcribe it to Pope *Dionyſius* about the year 270; others to *Euariſtus* about the year 212. A third ſort will not allow the Erection of Pariſhes to have been any ſingle Act, but a ſlow and gradual Work;

Work; the result of some considerable time, and of several Causes. Telling us that some times the missionary Preachers found incouragement to settle in a populous place, and by the liberal assistance of the zealous Inhabitants, to raise up an Oratory, or Chappel for Divine Worship, with a little adjoyning Manse. Sometimes Princes erected Conveencies for Devotion at their Country Houses, called Royal Free Chappels, with sufficient Revenues to Priests to officiat there. But more frequently Lords and great Men founded Churches upon their own Lands, for the use of their Families and Tennents: whereby the parishes were of no Larger extent, than the Founders Possessions. As these came to be Divided among more Proprietars, the new Masters obtain'd new Churches, with a parochial Circuit commensurate to their proper Estate. Pretending frequently that all their design in the Matter was to supply the Inconveniencies of Distance from, and difficult access to the *Ecclesia matrix*, or the Original Parish Church. These new Churches were therefore called *Ecclesiæ succursales*, auxiliary Churches. But must not be confounded with Chappels of Ease: The former, and not the Latter, being free, and independent upon the Mother Churches. (a) For a Chappel of Ease was serv'd by some inferior Curate or Vicar, maintained at the Charge of the Rector of the Parish. And those residing within

(a) C. *præcipimus* 16. qu. 1.

the Chappelry were bound to teſtify their reſpect to the parochial Church, by partaking of the Divine Ordinances there, at *Eaſter*, *Chriſtmaſs*, *whitſunday* and other Feſtivals. Some conſiderable Heritors were alſo allowed to Erect and Indow private Chappels, and Oratories within their own Lands for the uſe of their own Families: They being always oblig'd to pay their Devotion at the Mother Church upon Feſtivals. So by Act of *Parliament*, all Perſons were Ordain'd to Communicate once a year in their own Churches. (*a*) In the Council of *Toledo*, the definite Limits of a Pariſh was to comprehend, at leaſt *decem mancipia*. If there were fewer, that was ground to join the ſame to another Pariſh. (*b*) And one Pariſh was divided in two, and a new Subſidiary Church erected in the caſe of too many Pariſhioners, (*c*) or where ſome lay at too great a diſtance from the Parochial Church, or had difficulty of Acceſs by intermediate Waters. (*d*) *Anno* 1560. The Miniſters of the Reformation were diſtributed among the Burghs of *Scotland*. *John Knox* was appointed to ſerve at *Edinburgh*, *Chriſtopher Goodman* at St. *Andrews*, *Adam Heriot* at *Aberdeen*, *John Row* at *Perth*, *William Chriſteſon* at *Dundee*, *David Ferguſon* at *Dumfermling*,

(a) *Act* 17. *Parl* 16. *I.* 6. (b) C. *unio* 10. §. *fin. qu.* 3. *Bengeus de Benefic. ad verbum Militia cap.* 4. *N.* 19. (c) C. *precipimus* 16. *qu.* 1. *et c. nulli diſt.* 99. *Bengeus ibid N* 20. (d) C. *ad audientiam* 3. *Extr. de Eccleſ. ædificand. vel reparand. Bengæus ibid. N.* 21.

Paul

Paul Methvin at *Jedburgh*, Mr. *David Lindsay* at *Lieth*: Besides the *Superintendants* Ordained for Administration of Church Affairs, as Mr. *John Spotswood* for *Lothian* and *Merse*, Mr. *John Winram* for *Fife*, *John Areskin* of *Dun* for *Angus* and *Merns*, Mr. *John Willock* for *Glasgow*, and Mr. *John Kersewel* for *Argile* and *Isles*. But yet the first Act of *Parliament* that I find for bounding the Ministerial Duty by distinct Parishes is the Act 100, *Parl.* 7. J. 6. King *Charles* the first gave Order for dividing the Town of *Edinburgh* into four distinct Parishes, upon a Promise made in their Name, that they should provide each Parish with two Ministers, and 100 *Pound sterling* yearly, with a sufficient Dwelling-House, for the use of each Minister. But these Parishes are now increas'd to the Number of Eight, and every Ministers Stipend rais'd to 2500 *Merks*.

8. The Resolute Sufferings of Church-men under Heathen Persecution, rais'd their Credit, and filled the World with such Tenderness, and Esteem for 'em, that every one strove to outdo one another in Acts of Liberality towards them. And as the Christian Faith began to spread, and get footing in particular Nations under the benign influence and Countenance of secular Powers: Churches were built by Converts for the preaching thereof, and for Divine Service, more or less Magnificent according to the different Orders of Church-men they were design'd for; and also indowed proportionally with Lands and Possessions, or Tithes, or with both. Cathe-

drals were built for Bishops; Collegiate Churches for secular Canons, to sing Mass in; Parish Churches for preaching Priests; and in the wider Parishes, Chappels for private Devotion. Chanteries and Altarages were founded in Cathedral and Collegiate Churches for Massifying; besides many single Prebends up and down, here and there. To promote this pious Fervour, the Ecclesiastical Canons, allowed to such as had either indowed a Church, or built it, or given the Ground to build on, a power to present Ministers to supply the Cure, and injoy the Benefice, called the Right of Patronage. Which was extended in favours of the Authors, and Indowers of all other pious Foundations. But some deny that Patronage is acquired by the giving of the Ground only. I have no Room for Forraign Instances: There being so many in our own Countrey, which some time a day could vie and compete with any in *Europe* for fine, and sumptuous Churches. I shall begin with the Cathedrals; after I have desir'd the *Reader* to notice once for all; that when we see many Churches in *Scotland* still retain the Name of Saints, we are not thence to conclude that such Churches were erected by these holy men, or in their time: But that in honour to their Memory, they were long after Dedicated to them, upon the account of their being born, educated, or buried near such p laces.

9. B. *Spotswood*, out of *Boethius*, tells us that

Cratilinth

Cratilinth (*a*) erected in favours of the Christian Refugees under the last general Persecution, a stately Church in the Isle of *Man*, with sufficient Revenues, called by the Name of *Sodorense Fanum*, or the Temple of our Saviour; and that the same, while the Isle of *Man* continued in the possession of the *Scots*, was the Cathedral of the Bishop of the Isles, who is thence stiled *Sodorensis Episcopus*. But yet it is scarce imaginable how a King of the *Scots* could rear up a Cathedral there for Strangers, while there was yet none upon the continent of *Scotland* near his own Palace. B. *Lambertoun* (*b*) finished the Cathedral of St. *Andrews*; which was as Mr. *Slezer* (*c*) observes, *probably the Biggest in Christendom, being seven Foot longer, and two Foot broader than that of* St. Peter *at* Rome, *and for the height and imbellishing of its Pillars and* Roof, *the beauty of its* Stones, *and the symmetry of its parts, was one of the best of the Gothick kind in the World.* This Cathedral is now Demolished. *John Achaian* Bishop of *Glasgow*, built the Cathedral there: But it was not quite finished till *William Babington's* time. When the Magistrats once design'd to pull it down, & to build two or three Churches with the Materials on't; The Tadesmen conveen'd in Arms and oppos'd them. B. *Spotswood* says that St. *Ninian* the first Bishop of *Galloway* built a Church all of white Stone, called St. *Martines*, after his

(a) *In the year* 277. (b) *In the year* 1318. (c) *In his Theatrum Scotiæ.*

Grand

Grand-Uncle the Biſhop of *Tour's*, and afterwards *Whitehorn*: from whence the Biſhops of *Galloway* are ſtiled *Epiſcopi Candidæ Caſæ*. But others diſprove this Relation, and deny that St. *Ninian* was either the firſt Biſhop of *Galloway*; or yet in a capacity to erect any ſuch Church there. Mr. *Thomas Lauder* Biſhop of *Dunkeld*, finiſhed and dedicated the Church thereof in the year 1454, and magnificently ador'd it *Anno* 1010. When *Malcolm Kininmouth* was Biſhop of *Aberdeen*, the Cathedral began to be built to the Memory of St. *Machar*. *Alexander Kininmouth* caus'd demoliſh that Church, as not being ſufficiently Beautiful for a Cathedral, and laid the Foundation of one more magnificent; but did not live to finiſh it. *Henry Leigton* much advanc'd, and beſtow'd vaſt Sums for the perfecting of it. B. *Lindſay* Roof'd it, and Pav'd the Floor; B. *Dumbar* Cieled it, and built the South Iſle; And his Succeſſor B. *Stuart* erected the Conſiſtory-houſe. This Cathedral that had been a matter of Nine Score Years in building, did not laſt Twenty Years intire, when the Barons of *Merns*, in company with ſome *Aberdeens* Men, demoliſhed the Chancel, and ſpoil'd the Church of all its rich Utenſils and Ornaments. Which being Shipp'd in order to be ſold in *Holland*, ſunk, as my Author ſays, not far from the *Gridleneſs*. The body of the Cathedral was preſerv'd from Ruine by the Earl of *Huntly*. It is not certainly known by whom the Cathedral Church of *Brechin* was built. The Fabrick is

pretty

pretty handſom; but our firſt Reformers demoliſhed the Chancel. *Andr.* B. of *Murray* founded the Cathedral Church of *Elgin*, one of the rareſt Monuments this Nation can boaſt of: Which in length doth almoſt equal St. *Pauls* in *London*, and ſurpaſs it in breadth. Who built the Cathedral of *Dumblane* I know not, but *Spotſwood* ſays, that *Clemens*, one of the Biſhops thereof, reſtor'd it when decayed; And *Michael Ochiltree* another adorn'd it with rich Ornaments. *Gilbert* B. of *Caithneſs* Son to the Lord *Duffus*, erected the Cathedral there. I ſhall not tell who built the Cathedral of *Channery*, the Seat of the Biſhop of *Roſs*, becauſe I do not know: But our firſt Reformers demolished it, and ſome part on't hath been ſince Rebuilt. As for the Cathedral of *Edinburgh*, that vaſt and magnificent Structure called St. *Giles*, it was of old a Collegiat Church, and is now divided into four Parish Churches.

10. I advance from the Cathedrals, to Collegiat Churches or Provoſtries. Thoſe were founded and liberally indowed by Princes and great Men. King *James* the Third founded the Chappel Royal of *Stirling*, conſiſting of Prebends and a Dean, whoſe Officc is annex'd to the Bishop of *Dumblane*. *James* the Fourth erected the Provoſtrie of *Reſtalrig* in *Lothian*. The Trinity Colledge Church in *Edinburgh*, was built by *Mary* of *Gueldres* King *James* the 2d's Queen, who lies there inter'd. *Kirkbugh* in St. *Andrews*, was founded by the Earl of *Fife*. *Dumbar* in *Lothian*, by the Earl of *March*; And

Car-

Carſtorphine by *John Forreſter* Barron of *Carſtorphine*. *Dumbartoun* in *Lennox*, by the Earl of *Lennox*. *Lincluden* in *Nithſdale*, by the Earl of *Dowglaſs*. *Chrichtoun* in *Lothian*, by the Earl of *Bothwel*. *Abernethy* in *Strathern*, by the Earl of *Angus*. *Tayn* in *Roſs*, by the Earl of *Roſs*. *Minnibol* in *Carrict*, by Sir *Gilbert Kennedy*. *Methven* in *Strathern*, by the Earl of *Athole*. *Dirletoun* in *Lothian*, by Sir *Walter Halyburtoun* of *Dirletoun*. *Dunglaſs* in the *Merſe*, by the Earl of *Hume*. *Seaton* in *Lothian*, by the Lord *Seaton*. *Kilmaures* in *Cunningham*, by the Earl of *Glencairn*. And *Roſlin* in *Lothian*, famous for its curious Workmanship, by *William Sinclair* Earl of *Orkney*. There goes a Tradition concerning the Chappel of *Roſlin*, That it appears all on Fire before the death of any of the Family of *Roſlin*. Many of the above-mentioned Colledge Churches fell to the King by the Forefaulture of the Founders. Collegiat Churches began to be built after King *Alexander* the Third's time, when the erecting of Monaſtries was diſcouraged by the Popes uſurping the Right of Patronage. The chief Church in great Towns was a Collegiat Church; As St. *Giles* in *Edinburgh*, &c. All the Collegiat Churches within the Freedom of the Town of *Edinburgh* were gifted to that City by Queen *Mary*, the 13*th*. of *March* 1566, and the Grant was ratified by King *Charles* the Firſt in the year 1636.

11. Thoſe who cou'd not attain to the founding of Collegiate Churches, contented themſelves to found and endow Chappels, and Chappelries, and Altarages. There are many

Chappel-

Chappelries in *Scotland*, as the Chappel Royal at *Halyroodhouſe*, our Lady of *Loretto*'s Chappel near to *Muſſelburgh*, S. *Katharins* Chappel beſide *Edinburgh*, the Criſtal Chappel at *Dumfreis*, *&c.* Mr. *Thomas Lauder* Biſhop of *Dunkeld* founded a Number of Chappels and Prebends; ſome in his own Diocy, and others in *Edinburgh*. The Town of *Edinburgh*, at the Reformation, got a Grant of all Chappelries, Prebendries, and Altarages within their own Freedom. King *James* 6, in the Year 1572, mortified to the Town of *Brechin*, for the uſes of their poor, all the Revenus belonging to any Chaplainrie or Altarage within the Cathedral Church of *Brechin*. But in a Declarator at the Inſtance of the Laird of *Findourie* againſt the ſaid Town, (*a*) for declaring the Lands of the Chappelry of *Coldhame* to belong to him, as having Right by progreſs from the Chaplains of *Coldhame*: The Lords declar'd in his favours; in regard he was infeft upon the Kings Confirmation Charter, before any Infeftment taken by the Town upon their Gift of Mortification.

12. Having diſmiſs'd Cathedral and Collegiate Churches and Chappelries; I ſhall, in the next place, give ſome Inſtances of the Foundations of Pariſh Churches. It is reported, that one *Regulus* a *Grecian* having, in purſuance of Orders given him in a Viſion, put out to Sea in company with ſome of his Collegues, carrying the Arm Bone, three

(a) *February* 1682.

Fingers

Fingers, and three Toes of the Apostle S. *Andrew* in a little Box. And after they had long suffer'd under the horrid Storms of ill Weather, being cast into that Port of *Fife*, now called S. *Andrews*, without any thing sav'd but the Relicts: *Hergustus* King of the *Picts* entertain'd them nobly, and at their desire erected a Church, which to this day bears the Name of S. *Rule* from *Regulus*. Upon whom that Prince bestowed his own Palace with Lands adjacent. About the Year 800 *Hungus* King of the *Picts* having obtain'd a signal Victory over the West Saxons, at *Athelstane* Foord near *Haddingtoun*; which, according to the common Story, was foretold to him the Night before in a Vision by the Apostle S. *Andrew*, and facilitated by the appearing in the Air of a Cross in the Form of an *X*, as soon as the Battel began: *Hungus*, in Acknowledgment of this Victory, not only bestow'd on S. *Rules* Church many rich Gifts; But also (according to *Spotswood*) restored the Tithes to Church-men. Tho *Buchannan* will have it, that he only gifted to S. *Rule* the Tithes of the Crown Lands: Which *Feredeth* the Third from *Hungus* Revoked. *Achaius* King of the *Picts* did also, in commemoration of the foresaid Airy appearance of S. *Andrews* Cross, institute an Order of Knighthood in Honour of S. *Andrew*, who, in times of Popery, was reckoned the Tutelary Saint of *Scotland*. This Order was in a manner obliterated, till reviv'd by K. *James* 7, who created some Knights of S. *Andrew*: Which our present Queen hath likewise

likewiſe done. *Boniface* an *Italian* (who came into *Scotland* about the Year 697 to make our acquaintance with the Church of Rome) built to the Memory of S. *Peter* a Church, where he landed at the mouth of a little Water betwixt the Shires of *Angus* and *Merns*; erected another Church at *Telin*; a third at *Reſtennoth*; and a fourth at *Roſemarkie*, where he thought fit to reſide, and was buried. *Spotſwood* ſays, that *Padie* Church at *Fordon* was built by *Palladius*, from whom it took its Name. *Malcom Kenmure* built the Church of *Dumfermaling*. K. *Alexander* 1. built S. *Michaels* Church in *Scoon*. The Pariſh Church of *Elgin* dedicated to S. *Peter*, was founded by *George* the ſecond Earl of *Huntley* about the Year 1490. *Robert Ballendein* Abbot of *Halyroodhouſe* built the South Church of *Leith*, &c.

13. Patrons of Pariſh Churches frequently annex'd them with their Endowments to Cathedral and Collegiate Churches: Thinking thereby to acquire a more ſplendid Degree of Merit. The Church of *Cortoquhy* was annex'd to the Biſhoprick of *Brechin* by *Walter* Pallatine of *Strathern*, Earl of *Athole*, Lord *Brechin* and *Cortoquhy*. The Tithes of the united Pariſhes of *Dumbarnie*, *Pottie*, and *Moncrief* in *Perth* Shire belong'd to the Provoſtry of S. *Giles*. The Pariſh Churches of *Sautry*, *Fala*, *Lempetlaw*, *Weems*, *Kirkurd*, *Ormeſtoun*, and *Gogar* were annex'd to the Trinity College Church in *Edinburgh*. The Churches of *Lintoun*, *Duns*, and *Ghirnſide*, with their Chappels, were united to the Collegiate Church of *Dumbar*.

bar. The Churches of *Dalmahoy*, *Haltoun*, and *Boningtoun* were annex'd to the Provoſtry of *Carſtorphin*. Some Pariſh Churches were united to Colledges by their Founders. So *James Kennedy* Biſhop of Saint *Andrews* annexed the Churches of *Cults*, *Kembak*, *Dininno*, and *Kilmeny* to S. *Salvators* Colledge founded by him. The Cure of theſe Pariſh Churches annex'd was ſupplied by Vicar Incumbents. Who at their firſt Inſtitution had no fix'd Stipends, but only what the Parſons (whom they did perſonate and repreſent) was pleas'd to give them, as a Reward for their Service: And were put in for a time, to ſerve the Cure during the pleaſure of the Repreſentative Parſons. I call the Prelates of Cathedral and Collegiate Churches, Repreſentative Parſons, to diſtinguiſh them from thoſe who ſerv'd the Cure themſelves in their own Pariſh Churches, and enjoyed the full Rents thereof. Sometimes the Patrons of Churches, who were not qualified to ſerve perſonally, and ſome Parſons that had Pluralities, or found themſelves Infirm, I had almoſt ſaid Lazy, got leave to officiate by Subſtitutes and Vicars. The Church finding Temporary Vicars inconvenient, oblig'd ſuch as diſcharg'd the Spiritual Care of Churches by Deputies, to plant, for preventing Abuſes, perpetual Vicars or Curates in them: So called, becauſe they continued during their Lifetime, and had *Curam Animarum*. I find a third and worſe kind of Hirelings had alſo crept into the Church in times of Ignorance and Superſtition, under the Name of *Presbyteri*

ri conductitii, that took Livings to Farm without any Title: Which practice was condemn'd as an enormous Abuſe. (*a*) Sometimes only the Patronage of Pariſh Churches and Inferior Benefices, was mortified to Cathedrals, and Provoſtries; to which the Prelates preſented Parſons.

14. When the Monks and Nuns got up, and began to draw together into Monaſtries, they gain'd ſo upon the minds of people by an outward ſhew and profeſſion of more than ordinary Strictneſs and Holineſs of Life; that there was a general forwardneſs every where to make liberal proviſion for them. Every body being poſſeſs'd with a fancy, that the prayers of ſo many devout Men aſſembled in one place, would ſtand them in great ſtead, parted cheerfully with their Lands, and Tithes to Monaſtries: Others run into them, taking their Patrimony with 'em. Yea, that vain Opinion concerning the Merit of good Works, and Interceſſion of Saints ſo prevailed upon the Superſtitious World; That our Kings, and Countreymen with their conſent, frequently mortified Churches whereof they were Patrons, with all the Endowments of Lands and Tithes, to Religious Houſes. King *David* beſtowed the Church of S. *Cuthbert* upon the Abbey of *Halyroodhouſe*. King *Alexander* gave the Church of *Lanerk*, with the whole Lands, Tithes and Pertinents thereof, to the Abbacy of *Dryburgh*. *William Lambertoun* Biſhop of S.

(*a*) C. *quoniam enormis* 3: *Extr. ne prelati vices.*

Andrew;

Andrews gave unto the Priory there, the Churches of *Dairsey*, and *Abercromby*; and procur'd to it from the King, the Church of *Fordon* in *Mernis*. *Nicolaus* B. of *Dumblane* gave the half of the Church of *Strowan* to the Abbey of *Inchaffrey*. The Church of *Kincardin* was confer'd on the Abbacy of *Cambuskenneth*; and the Church of *Fiswic* upon *Coldinghame*. K. *Malcom* 4. granted a Charter to the Monastry of *Dumfermling* of the Tithes of *Perth*. The Parish Churches of *Athelstanefoord* and *Craill* were annex'd to the Priory of *Haddingtoun*. Many Grants of this Nature are to be seen in old Charters. Nay, 28 Churches belong'd to the Monastry of *Paisley*; 36 to that of *Kelso*; and 32 to the Monastry of *Aberbrothock*. In annexing of Churches with their Revenues to Abbacies, or Priories, the King and Bishops Confirmation was adhibited; In regard their Jurisdiction, Rights and Casualities were thereby impaired. These annex'd Churches were served by Vicars put in by the Convent. Abbeys got sometimes the Patronage only of Churches mortified to them: And the Abbots presented Parsons for supplying of these.

15. Princes and great Men not satisfied to enrich Religious Houses already founded, were acted and carried by a strange Zeal to erect new Monastries, and Nunneries, and to endow them with Lands and Tithes: As the most compendious way to save their Souls. I wave the many Religious Foundations made by *Scots* Men in other parts of *Europe*, particularly

larly in *Germany*, where, *Buchanan* (*a*) tells us, that *Scots* Men, even to his time, were Governours of these Monastries: And only notice what hath been done of that Nature at home among our selves. *Columba* founded the Monastry of *Icolmkil* in *Iona* one of our Western Isles; where the scattered Monks were first gathered together under one Roof. This Monastry, which borrows its Name from *Cella Columbæ*, became famous in succeeding Ages by the Royal Bounty of our Kings; and had a sort of Jurisdiction over the rest of the Monastries for a long time. This was the Burial place of our Kings from *Fergus* 2. to *Malcom Kenmure*, where 48 of 'em ly interr'd. It was united to the Bishoprick of the Isles in the Year 1617. The Abbacy of *Dumfermling* was founded by King *Malcom* 3, who lies buried there. In the Erection whereof certain Lands were reserv'd to the *Keldees*. At the general Dissolution it was first given to Secretary *Pitcairn*, then to the Master of *Gray*, and lastly confer'd on *Alexander Seaton*, who by King *James* was made Earl of *Dumferling*. The Lordship of *Musselburgh*, a part of the Lands of that Abbey, was erected in favours of the Lord *Thirlstane*; and excepted from the general Annexation 1587. The Abbey of *Coldinghame* in the *Merse*, which had once been plenished with Virgins, was erected into a Priory by King *Edgar*; and into a Lordship in favours of *Alexander Hume* by the Parliament 1606. King

(*a*) *Hist. Lib.* 5.

Alexander the First, Sirnamed *The Fierce*, founded the Abbeys of *Scoon* in *Gowrie*, and S. *Colm*, or *Inchcolm* in the Firth of *Forth*, and a Priory at S. *Andrews* in *Fife*. The Abbey of *Scoon* (where the Fatal Marble Chair, the Coronation Seat of our Kings once stood) was erected into a Temporal Lordship in favours of the Earl of *Gowrie*, upon his own Son the Commendators Resignation. But that Family being forfeited, Sir *David Murray* Comptroller to K. *James* 6. was created Lord of *Scoon*, and then Viscount of *Stormonth*. The printed Table of the unprinted Acts 1609 mentions the Erection of S. *Colm* to the Lord S. *Colm*: But there is nothing of it in the Register. The Lord *Down*, whose Successor is now Earl of *Murray*, was Commendator of *Inchcolm* after the Reformation, and got the same erected in his favours. The Priory of S. *Andrews* was erected to *Ludovick* Duke of *Lennox* Lord high Chamberlain, and Admiral of *Scotland*. But King *Charles* the First afterwards annex'd it to the Bishoprick. And in time of Episcopacy, it was the Primates Palace. K. *David*, commonly stiled Saint *David*, exceeded all others in his Immoderate Profuseness upon Monastries: Being just such another Religious Spend-thrift as *Constantine* the Great. He erected and endowed the Abbeys of *Jedburgh*, *Kelso* and *Melros* in *Teviotdale*; *Newbottle* and *Halyroodhouse* in *Lothian*; *Kinlos* in *Murray*, *Cambuskenneth* in *Stirling*-Shire, *Dundrennan* in *Galloway*, *Holm* in *Cumberland*: Besides two Monastries at *Newcastle*; and two Nuneries,

Nuneries, the one at *Berwick*, and the other at *Carlile*. Whereby S. *David*, with what he beſtowed on Biſhopricks, ſo clip'd the Royal Revenue, and impoveriſhed his Succeſſors, that King *James* the Firſt was ordinarly heard to ſay of him, *That he was a ſore Saint to the Crown*. The Abbey of *Jedburgh*, except the Kirk Lands of *Dalmeny*, was erected (*a*) in a Temporal Lordſhip to the Lord *Hume*, and afterwards to the Lord *Roxburgh*. The Abbey of *Kelſo* was beſtow'd upon the Earl of *Bothwel*; and he being forfeited, was annex'd to the Crown. But afterwards diſſolv'd and erected in favours of *Roxburgh*. *Melroſs* was gifted to *Thomas* Lord *Binning*, afterwards Earl of *Melroſs*, and at length Earl of *Haddingtoun*. By whom the Church Lands of *Cavers*, a part of the Abbacy, was diſponed to *William Dowglaſs* of *Cavers*. The Abbey of *Newbottle* was erected in a Temporal Lordſhip with the Superiority of *Preſtongrange* to *Mark Ker* Lord *Newbottle*, afterwards Earl of *Lothian*. But *Monkland* beſide *Glaſgow* which belong'd to this Abbey was diſponed to the Earl of *Haddingtoun*. *Holy-roodhouſe* was erected in favours of *John Bothwel*, Son to *Adam* Biſhop of *Orkney*, and is now her Majeſties chief Palace in *Scotland*. *Kinloſs* in *Murray* (formerly called *Kilflos*, from the plenty of Flowers there) was made a Temporal Lordſhip in favours of Mr. *Edward Bruce* Commendator of the Abbey: Whoſe Son King *Charles* 1. created Earl of *Elgin*; and on his

(*a*) *Anno* 1606.

Grand Child King *Charles* 2. confer'd the Title of Earl of *Alisburry* in *England*. *Cambuskenneth* was erected in a Temporality to *John* Earl of *Marr*. King *Malcom* 4. Sirnamed *The Maiden* founded the Abbey of *Cowper* in *Angus*, *Soutrey* in *Lothian*, and the Priory of *Manwel*. *Cowper* was erected to the Lord *Balmerino*'s second Son, and *Manwel* to the Earl of *Lithgow*. King *William* erected the Abbey of *Aberbrothock* in *Angus* to the Memory of *Thomas Becket* Arch-Bishop of *Canterbury*. This Monastry was one of the richest in our Nation; and for its sake, King *John* of *England* granted to the Inhabitants of the Town of *Aberbrothock*, the same priviledges through all his Kingdom, except in *London*, that his own Subjects did enjoy. This Abbacy was erected in a Temporality in favours of *John* second Son of the Duke of *Chattelrault*, afterwards Marquis of *Hamiltoun*. But now belongs to the Earl of *Panmure*. The Abbey of *Lindoirs* was also founded by King *William*, in Memory of the safe Return of his Brother *David* Earl of *Huntingtoun* from the Holy War; and that of *Balmerino* by *Emergard* his Queen. The former was erected to *Patrick* Lord *Lindoirs*, Brother to the Earl of *Rothes*; and the latter in favours of the Lord *Balmerinoch*. The Monastry of *Pasley* in the Barony of *Renfrew* in *Clidsdale*, was founded by *Walter* high Stuart of *Scotland* in the Year 1160. The Monks there wrote a Chronicle of *Scotland*, commonly called, from its Cover, *The Black Book of Pasley*. This famous Monument of Antiquity

quity *Lambert* got out of Preſident *Spotſwoods* Library after his Death, and carried it with him to *England*. The Abbey of *Paſley* was at the Reformation confer'd on *Claud Hamiltoun* third Son to the Duke of *Chattelrault*. *Croſregal* or *Rules-croſs* a Monaſtry in *Carrick*, was founded by *Duncan* Earl of *Carrick*; and united in the Year 1617 to the Biſhoprick of *Dumblane*. *Gilbert* Earl of *Strathern* founded the Abbey of *Inchaffrey*; to which he gave the third of his Inheritance. *Dornagild* Daughter of *Allan* Lord *Galloway* ſet up the Monaſtry of *Newabbey*, or *Dulcis Cordis* in *Galloway*. Mr. *Gilbert Brown* laſt Abbot thereof deſcended of the Houſe of *Carſluth*, died an Exile at *Paris*. This Abbey was erected in favours of Sir *Robert Spotſwood* Preſident of the Seſſion. From whom it was purchaſed by King *Charles* 1, and annex'd to the Biſhoprick of *Edinburgh*. *Malcom Mackduff* Earl of *Fife* erected the Monaſtry of *Culroſs* in *Perth*-Shire: Where S. *Mungo* is ſaid to have been a Monk. It was erected in favours of the Lord *Colvil*. By *Duncan* Earl of *Fife* there was a Priory for Nuns founded at *Northberwick* in *Lothian*; and another at *Haddingtoun*, by *Ada* Counteſs of *Northumberland*, King *Malcom* the Fourth's Mother. The Priory of *Haddingtoun* was erected to *John* Maſter of *Lauderdale*. The Abbeys of *Kilwinning* in *Cunninghame*, and *Dryburgh* in *Tividale*, were founded by *Hugh Morevil* high Conſtable of *Scotland*. The firſt was erected in favours of the Earl of *Eglingtoun*, and the latter to *Henry Erskin*, a younger Son

of *John* Earl of *Marr* Thesaurer, thereafter created Lord *Cardross*. The Monastry of *Sandel* in *Kintire*, was founded by *Sowr Maclerdy*. The Abbays of *Soulseat*, or *Sedes Animarum*, *Glenluce*, and *Tungland*, all in *Galloway*, were founded by the Lords of *Galloway*: The first by *Fergus*, the second by *Rolland*, and the last by *Allan*. The Monastry of *Holywood* in *Galloway*, was founded by *Dercongal*, and belongs now to the Earl of *Nithsdale*. That of *Dere* in *Buchan*, was founded by *William Cumming* Earl of *Buchan*. And *Fern* in *Ross*, by *Ferquhard* Earl of *Ross*. The Abbey of *Dere* was confer'd on *George* Earl of *Marshal*, to be called the Lordship of *Altrie*: As a Gratification to him for faithfully Discharging his Embassy to *Denmark* about the King's Marriage. *Fern* was annex'd to the Bishoprick of *Ross* by the *Parl.* 20. *Ja.* 6*th.* (*a*) King *Alexander* the Second founded the Priory of *Pluscarden* in *Murray*. The Lord *Bisset* that of *Beawley* in *Ross-shire*, and *Duncan* M'*coul* *Archattan* in *Lorn*. The Lordship of *Urquhart* was erected out of the Priory of *Pluscarden*. This Priory of *Archattan* and the Abbacy of *Icolmkil*, was united to the Bishoprick of the *Isles*. (*b*) The Priories of *Whithorn* and St. *Mary Isle* in *Galloway*, was founded by *Fergus* Lord *Galloway*; and erected in favours of the Laird of *Isle*. *Whithorn* was famous for the great resort of *Pilgrims* that came there to pay their Respects to St. *Ninian*'s Sepulchre. The Cross-kirk of *Peebles* in *Tweddale*,

(*a*) *Anno* 1609. (*b*) *Parl.* 23. *Ja.* 6. *Anno* 1617.

was

was founded by *King Alexander* the Third: By whom also the Priory of *Urquhart* in *Murray* was founded. The Priory of *Monimusk* in *Marr*, was founded by the Bishop of St *Andrews*. The Priory of *Straphillan* in *Athole*, was founded by King *Robert Bruce*. The Priories of *Trefontany* and St. *Bothan* in *Lammermore*, and *Eccles* in the *Merse*, by the Countess of *March*. *Ecclis* was erected in favours of Sir *George Hume* afterwards Earl of *Dumbar*. The Priory of *Lincluden* in *Galloway*, was founded by *Uthred* Lord *Galloway*. The Priory of *Elquhow* in *Strathern*, by *David Lindsay* Ancestor to the Earls of *Crawfurd*. Nay, King *James* the First himself, who complain'd so much of the Prodigality of former Kings, in exhausting their Treasures to inrich Monastries, could not yet refrain from building a beautiful one at *Perth* for the *Carthusians*, and bestowing large Revenues upon it. Which Convent was afterwards known by the name of *Charter-house*, and was the first that was pulled down at the Reformation. I have heard the Monastries in *Scotland* reckoned to be about Seventy in Number, whereof Fourteen were possess'd with Women; Thirty govern'd by Abbots, and Twenty-six by Priors. But in a word *Nulla Regio*, as the Learned *Craig* (*a*) observes, *In hoc nostro Regno frumenti aut rerum aliarum ad usum humanum necessariarum ferax, in qua locus præcipuus ad hæc monachia destinatus & extructus non erat.* There was such an humour in the Nation for building

(*a*) *Lib*: 1. *Feud*; *dieg*: 11.

of

of Cathedrals, Monaſtries, and Religious Houſes, That, as one pleaſantly obſerves, from the year 1100, when firſt the Kingdom was divided into diſtinct Biſhopricks, till the Reformation, the voice of the Goſpel could not be heard for the noiſe of Hammers and Trowels. We find no new erection of Monaſtries, except the *Carthuſian-houſe* at *Perth*, after the time of King *Alexander* the Third. The Pope's Incroaching upon the Right of Patronage reſerv'd by the Founders in their Foundation-Charters, diverted the Thoughts of perſons inclin'd to Pious Liberality from building of Abbacies, or Priories, to the ſetting up of Collegiat Colledges.

16. The Poſſeſſions of Eccleſiaſticks about the Twelfth Century, came to be term'd *Benefices*: Becauſe they flowed moſt from Pious Bounty and Liberality. *Germany* is the place of the Chriſtian World, where generally Church-men poſſeſs the greateſt Eſtates. But even in *Scotland*, the Clergy conſiſting of Biſhops, Priors, and Abbots, had ſuch Weight and Intereſt in the Governmet, by Reaſon of their vaſt Wealth and Poſſeſſions; That they became a third Eſtate in Parliament, where they made Fifty Three Votes: And were moſt juſtly ſubjected to the payment of the half of the Taxt-Roll in all publick Impoſitions. They were Lords of Regalities, and had their Baillies under them, who judg'd in Cauſes Civil and Criminal within their Diſtricts. But I notice this Difference betwixt Eccleſiaſtick and Laick Regalities, that the latter included a

Power

Power to Repledge from the Sheriff or Juſtice General, tho not prevented by the firſt apprehending or citing of the perſon; Whereas the Baillie or Steward of an Eccleſiaſtick Regality, could only Repledge, if he had prevented the Juſtice General or Sheriff: When Popiſh Orders were ſuppreſt, the Benefices with annex'd Regalities, were given to Lords of Erection: But with no more power of Repledging, than the Church-men had. Only they were allow'd the Eſcheats and Fines, even of thoſe condemn'd by the Juſtices. (a) The Eccleſiaſtick Indowments conſiſted in Tithes, Lands, Fiſhings, and perhaps ſome other Poſſeſſions. But I don't find that our Clergy had any Intereſt in Ships. St. *Auguſtine* (b) refus'd to increaſe the Revenues of his Church by a Stock in Shipping: Becauſe Sea-men in the caſe of a Wrack, are often put to the Queſtion, and vex'd with Law-Sutes, unbecoming the Meekneſs of the Church. But in *Italy* and *Alexandria*, the Church had many Corn-ſhips for tranſporting Proviſions to the Poor. (c)

17. When the Church was generally well indowed; ſeveral Canonical Decrees were made by Popes and Councils, againſt the Alienating of church Lands or Tithes. Which our Law-givers have copied after in their Acts of Parliament.

18. Having run over the Foundations and

(a) *Act* 29. *Parl:* 11. *Ja:* 6. *Mackenzie Obſerv: on the ſaid Act. Idem crim: tit: Juriſdiction of Regalities*, §. 6. (b) *Serm:* 49. *De diverſis.* (c) *Thomaſſin la diſcipline de l' Egliſe part:* 2. *chap:* 4. *N.* 3, 4, 5.

Indowments

Indowments of Bishopricks, Churches, and Religious Houses: It falls next to be considered what were the Ways and Means us'd by Monks and Priests, to induce persons to that superstitious kind of Prodigality; Then what Effects it had. It was ordinary with these Religious Quacks to possess the Consciences of the richer Sort with the Doctrine of Merit: Telling that the common Law of Gratitude requir'd the bestowing a part of GOD's Liberality to them, upon his Servants and Service; And that the easiest and cheapest way to attone and compound for a sinful life, was to mortify, when they were dying, to pious Uses, some part of that Worldly Lumber that could no longer be otherwise useful to themselves. And that it was better to part with it so, (since leave it they must) than in Favours of any person upon secular Considerations; or even to their own children, who perhaps might debauch the same to bad purposes, to the eternal ruine of themselves and others. Which could not chuse but be an aggravation of guilt upon the Defunct, for having so contributed thereto by the disposing of his Fortune. When they found the dying person coming to the Lure, and resolv'd to give, but debating with himself how much; their way was cunningly to suggest that, since the exact proportion betwixt our sins and our alms, could not be certainly known, it was the safest course to give all he had as an Expiation for all his sins. None were more dextrous, and made a better hand at this Sharping Trade than the Begging Friers,

who,

who, for all their profeſs'd poverty, were more juſtly term'd *Manducants*, than *Mendicants*. And gave a fair Proof of their Piety and Honeſty after *Flowdown* Fight, when they apply'd to their own uſe that great Treaſure depoſited with them, by ſuch as dropt their Carcaſes in that Fatal Expedition. 'Twas partly to ſecure dying perſons againſt the Importunity of theſe Impoſtoures, that the Law of Death-bed was introduc'd. (*a*) The third Council of *Chalon* (*b*) condemns thoſe Church-men who make uſe of Cunning and Artifice, to draw Gifts from the People in Favours of the Church. And by a Capitular of *Charles* the Great (*c*) Eccleſiaſticks are diſcharg'd upon their perril, to accept of Mortifications, whereby Children would in Effect be diſinherited, and cut off from ſucceeding to their Parents Eſtates. So, good St. *Auguſtine* refus'd univerſal Legacies in Favours of his Church, when the Teſtator left children or Parents, who might be prejudg'd, and ſuffer thereby. (*d*) Nor was *Auguſtine's* Generoſity ſingular; For a certain Man who had no children, nor hopes of any, having gifted his Eſtate to the Church of *Carthage*, with the Reſervation of his own Liferent; *Aurelius* the Biſhop repon'd him to his former Right, upon the unexpected Birth of a Son. (*e*) This is conſonant to the civil Law, which is more Favourable to children, than to a pious

(a) *Stair Inſtit: lib:* 3. *tit:* 4. §. 27. *lib:* 4. *tit:* 20. §. 38. (b) *Can:* 6, 7. *Anno* 813. (c) *L.* 1. C. 89. (d) *Thomaſſin Ibid: part:* 1. *liv:* 3. *chap:* 8. *N.* 2. (e) *Ibid: N.* 5.

cauſe.

Cauſe. (a) Becauſe Monks would not labour their Lands themſelves, they frequently granted Leaſes of 'em, called *Convenientiæ*, for a certain number of Lives, for payment of a yearly Rent or Duty. and ſometimes Benefactors got from Monaſtries Back-tacks of Lands or Tithes they had given them, for ſix or ſeven Lives called *Literæ Precariæ*, on condition of paying an eaſy yearly Duty: And after expiring of that Leaſe, the Monaſtry had the abſolute diſpoſal of 'em. This method contributed much to the Inriching of Abbeys: For People parted more willingly with their Eſtates, when they ſaw that that they ſtill reſerv'd the Profits of them for many years.

19. Now I ſhall give an Account of the Miſchievous Effects and conſequences of heaping ſo great Riches upon theſe Eccleſiaſticks and Regulars; which verified that ſaying of *Sulpitius Severus*, *Auro non ſtrui Eccleſiam, ſed deſtrui*: For as was antiently obſerv'd, *Religion brought forth Wealth, and the Daughter deſtroyed the Mother.* At this Door, firſt Lazineſs with a Train of Abuſes, and then Ignorance enter'd in upon the Church. Prelats came to diſdain preaching, and that they might oblidge the preaching Fryers, (who had a mighty ſtroke with the people) to repreſent them as of a pious and charitable Diſpoſition; gave away and impropriated, moſt of their own churches to Abbeys, leaving a poor prieſt to ſerve the pariſh. The pariſh

(a) *Arg. Authent: ſi qua mulier, C. de SS. Eccleſiis.*

prieſts

prieſts alſo ſcorning to do their own Work, hired the begging Friers to do it for them: who in their Sermons ſtrangely abus'd and impos'd upon Mens Conſciences by the ſophiſticate Doctrines of merit, ſupererogation, purgatorie, *&c.* For *Gregory* the Great having about the end of the ſixth Century invented Purgatory: Oblations were allowed to be made for the Ranſom of Souls out of that place of Torment. 'Tis ſtrange to think of the vaſt Riches the Clergy acquired by their prayers and Maſſes on that account. But in a courſe of ſome years, they wholly reſigned themſelves to pride and luxury. Church-benefices were only conſider'd as poſts of Honour, and profit, to which Men did aſpire by all the baſeſt methods of *Simony*, & ſervile compliances: and when they were poſſeſs'd of 'em, all their thought was taken up with intrigues of State, and how to ſerve and Gratify their by-ends of Pleaſure, Avarice, and Ambition. 'Tis incredible to what degree corruptions and abuſes were carried by Reſignations *in favorem*, Unions, and Commendams, diſpenſing with pluralities, and non-reſidence, and making Biſhops and Abbots of the ignorant children of Noblemen. The clergy by little and little withdrew from their Obedience to the civil Magiſtrate, and appeal'd on all occaſions to the See of *Rome*. The Pope loving to have it ſo, ſupported them in their Diſloyalty and indulg'd their Vices. This was the ſtate K. *James* the firſt found the Church in, when he came to the Throne: which that wiſe

Prince

Prince cured in some measure, by incouraging Learning and Learned Men. But the publick Treasurie had in former times been so drain'd, and the Crown Patrimony lessen'd by Religious Foundations, and provisions, that he could hardly find Mony out of his own Rents to pay his Ransom; And Queen *Mary* was forc'd, as we shall hear, to pare a Third off Ecclesiastick Revenues to maintain the Expenese of her Government, and the Orthodox Ministers. Some Popes had shown an Inclination to the Reforming of diverse abuses in the Church of *Rome*: but were diverted from their Resolution by a State politick, fearing that the amending and acknowledging of some corruptions, would be a publick confession that the Church had Erred, and draw more changes after it. So that in stead of removing Abuses, all were justified and maintain'd.

20. When the corruptions of the Popish clergy grew intolerable in *Scotland*, through the universal prevailing of Ignorance and impiety; and Monastries which had been founded for pious and charitable uses, turn'd nurseries of Vice: The only Wise GOD put it in the Hearts of some to breath after a Reformation; who with the Danger of their Lives made open profession of the Truth, and zealously preach'd down Error, Superstition, and Idolatry. These were countenanced and supported by a considerable party of the Nobility and Gentry, who went under the Name of Lords of the Congregation: The Reformers challeng'd

challeng'd the Popiſh clergy to Diſpute upon the controverted Points of Religion, particularly the *Maſs*, to be decided from the Scripture : But they refuſed to be Determined by any other Rule than the Authority of Councils and the Canon Law. The people did Interpret this as a Diſtruſting of their Cauſe ; and cry'd out, What have we any more to do with Idols and Monaſtries : And do what the Queen Regent could, with her Forces, they Invaded all cloiſters and Monaſtries in the Kingdom, which they Spoiled and Demoliſhed ; beginning with theſe at *Perth*. They pulled down Altars, and rifled Curches of their Images, and other Idolatrous Traſh, and ſuperſtitious Pageantry. But the Fabrick did not ſuffer ſo much by them : For no Country pariſh Church was Demoliſhed ; and ſeveral others were alſo ſpared and left intire. As in *Glaſgow* the Cathedral, and in *Edinburgh* St. *Giels*, the Colledge Church, Abbey Church, and *Magdalens* Chappel. Few alſo of the Abbey Churches were totally pulled down; but generally as much was left ſtanding, as ſuffic'd for the uſe of the Miniſter and Congregation : as it is in *Jedburgh*, *Kelſo*, *Melroſs*, *Coldinghame*, *Haddingtoun* and elſewhere.

21. The Reformation began in *Scotland* in the year 1558, and the Popes Juriſdiction and Authority was Aboliſhed by Act of Parliament, 24 *Auguſt* 1560. Which was Ratified by the 2 Act of King *James* the ſixths firſt Parliament 1567. And all perſons Diſcharg'd to make Application to *Rome* for

Gifts

Gifts or Rights to any thing in *Scotland*, under the pain of Barratry; that is Banishment and Infamy. Yet severals did purchase antedated Grants and Priviledges from the Pope; and others did forge and counterfeit: Thinking thereby to injoy Benefices after the decease of the then Possessors, to the great prejudice of the King, and the Reformed Ministry. In order to Remedy this inconveniency, and discover the Imposture, all Bulls, Provisions, Confirmations, and Gifts of Befices granted by the Pope, were Ordained to be produced before Commissioners appointed by His Majesty, to be Registrate and marked, if found true and lawfully purchased before the 24 of *August* 1560: otherwise to be declared null and insufficient in all time coming. (*a*)

22. The Ministers of the Reformation increas'd, and proselyted severals of the Popish clergy: and these were suffer'd to injoy their Benefices during life. So *Mark Ker* the last Abbot of *Newbottle* imbrac'd the Reformation, and became Commendator. By the Act of Annexation 1587, the Conventual Brethren of the Abbey of *Dumfermling*, were no ways to be prejudg'd of their Portions during their Lifetime. But some thought fit to joyn the Reformers, and imbrace the *Protestant Religion*, merely as a Politick to keep themselves in possession of their Benefices. So did *Patrick Hebburn* Bishop of *Murray*, to save his Ab-

(a) *Act* 51. *Parl*: 3. *Ja*. 6.

bey

bey of *Scoon*, whereof he was Commendator: for when that came accidentally to be burnt, he soon revolted to his old way. Upon the Death of any of the indulged Beneficiaries, the King presented a Laick in his Room; and the portions of such private Monks and Nuns as had deceas'd since the year 1560, or should die at any time thereafter, before the Abbeys, priories and Nunneries had fallen to the Crown by Decease, Forefeiture, or Deprivation of the then present Possessors, were by the 137 Act, 8 *Parl. Ja.* 6. declared to belong to his Majestie, and appropriate as a help to establish a Royal Troop of Horse Guards. But his Majestie dispon'd them to the Lords of Erection within their several bounds, and retained only Right to the Portions, of such as died within Abbacies and Priories not erected.

23. The Orthodox Ministers continued in the Exercise of their Pastoral Charge with unwearied Diligence: But without any certain Stipend for some years after the 1554, when *John Knox* came into *Scotland*. By an Act of privy Council in Queen *Maries* time, all Benefices not exceeding two Hundreth *Merks* of yearly Rent, were Ordained to be disponed to qualified Ministers: which was Ratifyed by the 52 *Act*, *Parl.* 3. *J.* 6. And afterwards extended to all Benefices of cure under prelacies, (*a*) Some Ministers again

(a) *Act* 102. *Parl.* 7. *J.* 6.

were provided to prelacies, and these were allowed to sit and vote in Parliament.(a) Likewise for the Ministers in general their better Provision; and because the ordinary Crown Rent sufficed not to defray the Charges of Queen *Maries* House: The Prelats and other popish Ecclesiasticks, were dealt and prevailed with by the Lords of Privy Council, to resign in her Majesties hands, a Third of their Benefices, upon being insur'd of the two parts free of the Reformed Ministers Maintenance, during their Lifetime. They saw the Provision of the Ministers would surely fall as a Burden upon their Copy-holds: And therefore suffer'd the paring of their Nails to the Quick to save their Fingers; being content to part with something for fear of losing all. Upon their Resignation, an Act of Council was made, Ordaining the third of the Rents of all Benefices in *Scotland*, to be applyed in the first place to the maintenance of Ministers; and the Superplus to support the publick Affairs of the Nation; and Prelats and others for that effect, to give up Rentals of their Benefices to a certain Collector and Clerk. Rentals, but undervalued, were accordingly given up by most part of 'em, and Recorded in three Rental Books; but some did not at all compear. Queen *Mary* afterwards granted Discharges to severals of their Thirds, and the Ministers came to be reduced to great straits, through the not payment of their Sti-

(a) *Act* 231. *Parl.* 15. *J.* 6.

pends.

pends. Therefore by the 10 *Act*, first *Parliament*, *J.* 6. It was Statute, that in time coming, ay and while the Church came to the full poſſeſſion of their proper Patrimony, the Tiends, the whole Thirds of all Benefices ſhould be firſt payed in to the Collectors of Miniſters Stipends (who were yearly to compt in Exchequer for their Intromiſſion) that the Miniſters might firſt receive their particular Stipends, and the Reſt or Superplus go to the King's uſe. Whereof there was yearly a Book made, which altered, and was more or leſs, according to the quantity of Stipend payed to Miniſters; and was the King's Collectors Rule to Charge for the Superplus due to his Majeſtie: with which he uſed alſo to charge for Benefices omitted, or undervalued in the upgiven Rentals; and for the Rents of common Kirks, or for their Lands that were alſo deſtinated to the foreſaid uſes, and exigences of Church and State. For the better payment of Thirds, particular Localities were aſſign'd in every Benefice, called *The Aſſumption of Thirds*. And beneficed Perſons were incapable to ſet Tacks of the particular Rents aſſum'd, or to grant Penſions forth thereof: All ſuch Tacks and Penſions being declar'd null, by Act of Council in *February* 1587, which was Ratifyed in Parliament *June* 1592. In order to the Diſtributing of the Thirds among Miniſters, a Commiſſion was paſs'd under the King's Seal, to ſome of the Nobility and Miniſtry, for meeting at *Edinburgh* to modify Stipends for Miniſters in

planted Churches. These Commissioners were called *The Plat*, and sat yearly in *November* till Bishops were restor'd. (*a*) I come next to consider how the two parts of Benefices were dispos'd of till that time.

24. When the Ecclesiastick Beneficiaries, who had Right to their Benefices with the burthen of Thirds came to die; the King presented Laicks, who had been most active in the Reformation to these Benefices: who were called Commendators, and not only injoyed all the Profits and Casualities, of both Spirituality and Temporality thereof; but also sat and voted in Parliament, as Bishops or Abbots, or Priors, according to the Dignity of the Benefice. So the Lord *Down*, whose Successor is now Earl of *Murray*, was Commendator of *Inchcolm* after the Reformation; and Mr. *Edward Bruce*, the Earl of *Elgin's* Father was Commendator of *Kinloss*; and Mr. *George Buchannan* our Historian Commendator of *Crosregal*; and Mr. *William Melvil* Commendator of *Tungland* and *Killwinning*. But in regard as simple Usufructuaries, they could not transmit to their Heirs, these Benefices whereof they were Titulars; they got them erected in Lordships and Baronies. However this was not done with such a careless and undistinguishing Liberality as some would have us believe King *Henry* the 8*th* bestowed the

(*a*) *Anno* 1606.

Abbey

Abbey-Lands in *England*. (7) Popiſh Benefices here not a few, were by King and Parliament conferd on Burghs Royal, for the pious Uſes of maintaining their Miniſters, Colledges, and Hoſpitals. Many Churches were united to Colledges in particular: as the Church of *Forteviot* to the old Colledge of St. *Andrews*. (a) Thoſe of *Kilbride*, and *Renfrew* to the College of *Glaſgow*. (b) And the Rectory of St. *Machar* to the King's Colledge of *Aberdeen*. As for the erected Baronies, many of theſe were made before the general Act of Annexation (which is the 29 of K. *James* the ſixth's 11 Parliament, and the firſt after his Majority, holden in the year 1587) whereby, for ſupporting the Royal Dignity, without Taxing the Subject, and to ingage future Kings not to return to Popery, the Temporality of Benefices was Annex'd to the Crown, with a Proviſion that the ſame might

(7) Il y eut des gens qui non ſeulement recurent de ſes bien faits; mais qui furent avancez aux charges et aux dignitez, ou pour avoir fait rotir a propos un cochon de lait, qui etoit ſon grand Ragout, ou pour avoir placé ſa chaiſe ni trop loin du feu, ni trop pres; ou pour l'avoir le mieux diverti dans le jeu. Hiſtoire Du ſchiſme D' angleterre De Sanderus liv. 1. Sur la fin. *In this Age, ſmall Merits of Courtiers met with a prodigious Recompence for their Service. Not only all the Cooks, but the meaneſt Turn-broach in the Kings Kitchin did lick his Fingers, yea the King's Servants to the third and fourth Degree taſted of his Liberality*, &c. Fullers *Church-Hiſt. of* Britan, *Lib.* 6.

(a) *Parl.* 12. *J.* 6. *Anno* 1592. (b) *Parl.* 22. *J.* 6. *Anno* 1607.

nevertheleſs be ſet in Feu; and the Eccleſiaſticks are declared free of Taxation and Warrandice, except from their own Deeds, as to former Feus, Tacks, or other Rights granted by them of the Lands annexed. Preceeding Erections were Confirm'd, and ſome other Kirk-Lands left to the King's diſpoſal; with a power to make from the Act, what Exceptions he pleas'd, betwixt and the 15 *Auguſt* then next, ſeveral of which are therein ſubjoyned. All great and ſmall Teinds not feued with the Stock pertaining to any Parſonage or Viccarage, are excepted in the Act; and when Stock and Teinds are ſet in Feu together, the entire Superiority, and nine parts of the whole Duties payable for Stock and Teind, is declared to belong to the King; and the Eccleſiaſtick or Titular to have the Tenth. All Parſons or Viccars Manſes, with four Akers of Glebe neareſt to the Church appointed for the Miniſter ſerving the Cure. All Lands, Teinds, and others diſponed to Colledges, Schools, or Hoſpitals, or for ſuſtaining of Miniſters within Burghs, with all Rights of Laick Patronage, are particularly excepted: together with the Houſes and yards of Prelats, and other Poſſeſſors of great Benefices, having then, or formerly vote in Parliament. The property of all Lands, and others diſponed, or ſet in Tack, are ſecur'd to the perſons having Right thereto, for payment of their reſpective Duties as formerly: only the Superiorities of theſe, & of Burrows of Regality, & Baronie, Heritable Baillieries and Stuartries

formerly,

formerly held of the Church, are declared to belong to the King, and the Vaſſals Heirs to be entered by Brieves out of the Chancellary; without neceſſity upon the Vaſſals to renew their Rights from his Majeſtie. Neither can his Majeſtie quarrel the ſame, being Confirm'd by him, or his Predeceſſors, for bygone Contravention of any Clauſe or Condition in their Infeftments; nor for Diminution of the Rental, if it be not of the old Penny Mail, *de liquido in liquidum*; nor for Converſion of Victual into Silver Duty, or any other Cauſe: Except for Falſhood; or for not payment and performance in time coming, of the Duties and Services contained in their Infeftments. This is the Subſtance of the Act.

25. It may be alledg'd againſt this Act of Annexation; That the annexing of Popiſh Benefices to the Crown, or converting them to civil and profane uſes, is a plain contravention of the Founders Will. But the Act may be thus accounted for, 1. Moſt of theſe Mortifications were fraudulently elicited from perſons impos'd on by ways and means of Prieſtcraft; and conſequently null. (*a*) 2. 'Tis the publick Intereſt, that none make bad uſe of their property. (*b*) And ſince *neme cavere poteſt ne Leges in ſuo Teſtamento habeant locum*, (*c*) no Teſtament againſt Law or good manners is valid. (*d*) And therefore it is incumbent on the Orthodox Magiſtrat, as

(a) *l*: 53: *ff*: *de Regul*: *Juris*: *l*: 15: *ff*: *de Juriſdictione*. (*b*) §: *ult*: *Inſtitut*: *de his qui ſui vel alieni juris*. (c) *l*: 55: *ff*: *de Legat*: 1. (d) *l*: 112: §: 3: *ff*: *eodem*.

Gods

Gods Vicegerent, to convert to some honest and necessary use of the Republick, that which was left for an unlawful use. (a) So did the Princes and Cities of *Germany* at the Reformation; & defended their practice by many Reasons extant at large in *Sleidan*. (b) But then one will say, why were they annex'd to the Crown? The Reason given for this in the Act, is, because former Kings having impoverished themselves, by unjustly and unprofitably mortifying a great part of their Revenue to the Secular and Regular Clergy; the same should return to the Crown. From this it would seem consequential, that such Mortifications, as had been made by private persons, should have also return'd to them. But besides, that it would have been hard to find out the true Heirs of these Founders and Benefactors, after so long a time: The Religious Houses being dissolv'd, the whole Revenue did by Law fall to the King, as Founder General of them all mediately or immediately, who confirmed or consented to, or at least connived at these Foundations. 2. These Benefices had been originally destinate to maintain an Idolatrous and Superstitious Worship, such as Massifying for the Living and the Dead, Offices to charm Souls out of the Popish Prison of Purgatory; Invocation of Saints, and the constant keeping up of Lights Night and Day for their Honour: Which doth appear from the Tenor of the

(a) *l*: 4: *ff*: *de Administ*: *Rer*: *ad Civitat*: *Pertinen*: *l*: 16: *ff*: *de Usu & Usufructu Legato*. (b) *Commentar*: *Lib*: 11: *anno* 1537: & *Lib*: 13: *anno* 1540.

Foun-

Foundation Charters, that commonly bear *pro Peccatis Eluendis, pro Anima, pro Redemptione Animæ, in Remedium Animæ Predeceſſorum, pro Salute, pro Luminaribus Conſervandis, &c.* Now, that which belongs to a Falſe Religion comes under confiſcation. (*a*) 3. *Quæ nullius ſunt, ea ſunt Domini Regis*; and theſe were ſuch: For the old Proprietars had no Right to them, after they were once diſponed; nor the Religious Houſes after their Extinction. Albeit, where a Mortification is made, or a Legacy left to one Incapable at the time by a perſon who did not know ſo much, it ſhould not fall to the King as caduciary, but remain with the Donor, or Teſtators Heirs, (*b*) ſince the property was never transferred. (*c*)

26 Many new Erections of Church Lands and Tiends into Lordſhips and Baronies were made after the general Annexation; but with the burden of competent proviſions to Miniſters within theſe Erections. Biſhops Lands only were never erected; For that the King was reſolv'd to re-eſtabliſh Epiſcopacy: On the contrary, *anno* 1597, all Biſhopricks were ordained to be diſponed to actual Miniſters and Preachers. (*d*) But then ſome Feus were ſet before the Annexation; ſome common Churches diſponed by the King; and ſome Patronages with conſent of the lawful Titular, and Ratified in Parliament; The Caſtle of S. *An-*

(a) *l*: 4: §: 1: *& ſeqq*: *Cod*: *de Hæreticis & Manichæis*. (b) *l*: 3: *pr*: *& §*: 1: *ff*: *de his quæ pro non ſcriptis habentur*. *l*: *un*: §: 2: *& 3*: *C*: *de Caduc*: *Tollend*. (c) *Mackenzie Obſerv*: *on the Act* 6: *Parl*: 1: *Ch*: 1. (d) *Act* 231: *Parl*. 15: *J*: 6.

drews

drews was disponed to *George* Earl of *Dumbar*; and the Lands of *Lethem* and *Monimail*, with the Patronage of the Church thereof, to Sir *Robert Melvil* of *Mordicarnie*: All which were specially excepted, secur'd and confirm'd in the Act 1606 restoring Bishops.

27. B. *Spotswood* tells us, that his Majesty, upon second Thoughts, was sorry for having pass'd the general Act of Annexation; and recommended to his Son the Rescinding thereof as a vile and pernicious one. All Rights of Laick Patronage were excepted from it: That is such Lay Patronages as were lawfully constitute before the Reformation; and not these the King had Right to as coming in place of the Pope, and which he disponed to Laicks; For the latter are still accounted as they were originally Ecclesiastick Patronages. Provostries and Prebendries of Collegiate Churches, Altarages and Chaplainries having been founded and doted by Noblemen and others for their own Ease, and Spiritual Advantage; they were thought to have more Interest than other Patrons in these Benefices, and therefore were allowed after the Reformation to dispose upon them for the Entertainment of Bursars in Colledges, without regard to the uses they were originally destinate to by the particular Foundations. (*a*) These being unlawful in a Protestant Countrey; and the liberal Education of Youth a matter of general concern,

(*a*) *Act* 12: *Parl*: 1: *Act* 158: *Parl*: 12: *J*: 6: *Act* 54: *Parl*: 1. *Ch*: 2.

being

being at that time very much obſtructed, and many a good Genius for Learning cruſh'd, through the poverty of Parents not able to maintain their Children at Schools or Colledges; It was judg'd the moſt ready Expedient for remedy of this Evil, to indulge Patrons of theſe kind of Benefices to preſent Burſars to them one after another; who might have Right to the whole Fruits and Profits thereof during their time. So that theſe Benefices were only ſuppreſt in ſo far as concerned the Popiſh Offices of Religion therein performed. Out of ſome Collegiate Churches Parſonages were erected. The Lord *Chrichtoun*, as Patron of the Pariſh Church of *Chrichtoun*, having, with conſent of the Arch-Biſhop of S. *Andrews*, to whom *Lochquharret* belong'd as a Menſal Church, founded the Collegiate Church of *Chrichtoun* out of the Rents of theſe Churches; reſerving to the Biſhop the Patronage of the Prebends of *Vogrie*, *Arniſtoun*, *Middletoun*, and two Clerks, that got their Benefices out of the Rents of the ſuppreſt Church of *Lochquharret*. Theſe Benefices were in the Year 1596 diſſolv'd from the Colledge Church, and erected into the Parſonage of *Borthwick* by a Charter under the Great Seal. This Erection was ratified by the Parliament 1606; and declar'd to be valid, tho not proceeding upon dimiſſion of the Prebendaries, and wanting the conſent of the Lord *Chrichtoun* as Patron of the Collegiate Church: Reſerving to the Prebendaries ſettled before the Erection, the Rents of their Benefices during

their

their Lifetime. The Bishop of S. *Andrews* did also ratifie the foresaid Erection in the Year 1609. Many Parish Churches were united to Bishopricks: As the Parsonage of *Glasgow* to the Bishoprick thereof; (*a*) the Church of *Meigle* to the Bishoprick of *Dunkeld*; and the Church of *Kilmochormuck* to the Bishoprick of *Argile*. (*b*)

28. The provision of Ministers being mightily disappointed, and other Inconveniences happening by the numerous Erections of Church Lands and Tithes; The Parliament annulled all such as were made after the Act of Annexation 1587: Except parts of Church Lands already erected in favours of these who since that time had been Nobilitate, and sitten in Parliament as Temporal Lords. (*c*) But in regard many others, for the more security, had obtained Ratifications in Parliament of their posterior Erections; all such as were granted and ratified since the Act of Annexation 1587, and not therein excepted, were rescinded and declared null by the 195. *Act.* 14. *Parl. Ja. 6.* This was very disobliging to the Parties concerned and their Friends; and therefore to quiet their Minds, all Erections of Benefices not being of Cure belonging to Bishopricks were afterward ratified and confirmed: And the general Annexation Act rescinded, in so far as prejudicial to the Estate of Bishops. (*d*) But their Superiorities were

(a) *Parl:* 18: *J:* 6: *anno* 1606. (b) *Parl:* 23: *J:* 6: *anno* 1621. (c) *Act* 119: *Parl:* 12: *Ja:* 6. (d) *Act* 2: *Parl:* 18: *Ja:* 6.

not

not expreſly reſtored: Only there is a Clauſe in the 14. *Act.* 1. *Parl Ch.* 1. That the Kings being Superior to Vaſſals of Erections ſhall be but prejudice to Biſhops and their Chapters of their Rights of Superiorities. Nor did the Chapters recover their Temporalities till the Year 1617; and then the Priory of S. *Andrews* that had been formerly diſponed to the Duke of *Lennox*, and the Houſe of *Hamiltoun*, which the Marquis of *Hamiltoun* had got Right to, were excepted. (*a*)

29. I now return to let ſee what came of the Thirds. They were diſpos'd of by the Commiſſion of Plat, till the Reſtauration of Biſhops in the year 1606. who by the 2 *Act* 18. *Parl: Ja:* 6. were ordained to maintain their Miniſters upon the Thirds according to the ordinary Aſſignations; And by the third Act of the ſame Parliament, to give up ſufficient Rentals of their Benefices within a year to the Clerk Regiſter, under the pain of 1000 Merks; That Miniſters might be the more aſſured of their Stipends to be appointed forth thereof. Miniſters payment out of the Thirds turn'd to very ſmall account, for of two Valuations that were made, the one was ſo inconſiderable, and low, that their proportion came to juſt nothing; And the other in the year 1584, tho ſomething more tolerable, was ſo hardly made effectual, through the oppoſition of perſons intereſſed, that all the Miniſters got by it was ſpent in purſuing payment. So that

(a) *Act* 2. *Parl:* 22. *Ja:* 6.

many

many chus'd rather to drop their pretenſions, than to vex themſelves in vain with a tedious and expenſive Proceſs. This allowance out of the Thirds, was to continue till they were competently provided out of the Teinds. (a) But the Thirds happening to be extinguiſhed, partly by the Reſtitution of Biſhops, who got Right to their own Thirds; And partly by the Erection of Abbacies and Priories, *&c.* into tempoal Lordſhips, in which the Thirds were diſcharg'd in Favours of the Lords of Erection, they planting the Churches: That Fond could no longer ſerve for a proviſion to Miniſters. Therefore Commiſſions of Parliament were appointed to plant Churches, and modifie Stipends out of the Teinds: Which turn'd the Books of Aſſumption in deſuetude; tho they ſtill continue uſeful for clearing the old Rentals of Benefices.

30 Having thus carried my Diſcourſe concerning Eccleſiaſtical Revenues down this length; The Hiſtory of Tithes would require to be more particularly conſidered: But that is reſerv'd to the ſecond part of this Book. I ſhall therefore now ſet my ſelf to treat of the Temporality of Benefices. And the propereſt way that I can at preſent imagine of performing this, will be to explain, 1. How Titles to Benefices are acquir'd by Eccleſiaſticks; And when they commence to take Effect. 2. What way they are extinguiſhed, and when they ceaſe to have effect. 3. To treat of Rights to

(a) *Act* 10. *Parl*: 1. *Ja*: 6.

Bene-

Benefices that may be acquir'd from Beneficiaries. 4 Of Rights acquirable by Beneficiaries. 5. To consider benefic'd persons in the triple capacity of Subjects, Superiors, and Vassals; And to shew what is due to, and by them, in these different respects. Of which I shall discourse in order as distinctly as I can.

CHAP. VI.

How Titles to Benefices are acquired by Ecclesiasticks; And when they commence to take Effect? Where also of Annats.

AN Ecclesiastick doth acquire the Title to a Benefice by some certain Formality of Investiture from a person having Right to confer the same. Bishops were elected by the Chapter of the See they were design'd for, upon a write from the King called *A Conge d' Eslire*, That is a power to elect, who yet were determin'd as to the person by his Majesties Recommendatory Letter. The Chapters Election being return'd, the King granted first a Patent to the person elected, carrying a Right to the Revenue, which pass'd through all the Seals: And then a Mandat to three Bishops at least for his Consecration, which pass'd only the Great Seal *per saltum.* (a) If a Bishop was

(a) *Act* 1. *Parl*: 22. *Jac*: 6.

translated

tranſlated from one Dioceſe to another, he needed not to be conſecrated of new again: For Conſecration is an indelible Character, that needs not to be renewed. (*a*) The Formality of Admiſſion to inferior Benefices of Cure is by Collation, and Inſtitution, unleſs where the Biſhop himſelf as Patron confers *pleno jure*; In which caſe Preſentation and Collation are the ſame. Now when the Government of the Church is in the hands of Presbyters, the Act of Ordination and Admiſſion by the Presbytrie ſerves for all. In Benefices that are not of Cure, ſuch as Prebendaries or Chaplainries, Preſentation was ſufficient without the Ceremony of Collation or Inſtitution.

2. The Title to an Eccleſiaſtick Office is of a quite different nature from all other civil Rights. Since theſe are the Stronger, when given for an Onerous Cauſe, as an equivalent price; Whereas all Contracts for gain in the diſpoſing of the other, go under the odious character of *Simoniack* Pactions, and the parties are puniſhed as guilty of *Simony*. For this Crime is more extenſive than the ſin of *Simon Magus*, from whom the name is borrowed. It was but rare during the firſt three Centuries of the Chriſtian Church: The Temporal Advantages of the Clergy being then leſs tempting to ambitious Spirits. (*b*) But turned more frequent afterwards, as the condition of the

(a) *Hughs Parſons Law, cha:* 1. (b) *Thomaſſin la diſcipline de l' Egliſe part:* 2. *liv:* 3. *chap:* 11. *N.* 3.

Church

Church was bettered and exalted, with all the circumstances of Prosperity, Riches, and Grandure. But *Thomassin* (*a*) observes *Simoniacal* Pactions to have been more common in the Western Church, and more authoriz'd in the East. The Apostolical Canons condemn as *Simony* the purchasing of Ecclesiastical Dignities, whether by Money or Favour, or the influence of Secular Powers. (*b*) *Peter Damian* distinguisheth three sorts of *Simony*; One committed by the hand in making of Presents, *munus a manu*; another by the Tongue in undeserved Praises and Flatteries, *munus a lingua*; A third by Officious Services, *munus ab obsequio*. (*c*) And 'tis a more heinous Fault with him to compass an Ecclesiastick Dignity by Services done to Princes and great Men, than by open traffick in Money. (*d*) Some of the Fathers look'd upon *Simony* as a *Heresy*, if not the Sin against the Holy Ghost. (*e*)

3. The going to *Rome*, or making Applications to the Pope for getting Benefices in *Scotland* is interpreted *Barratry* with us; To be tryed before the Justices or Lords of Session, and punished by Banishment and Infamy. (*f*) And *James* Arc-bishop of *Glasgow* was depriv'd after the Reformation for going to *Rome*. (*g*) *Bar-*

(a) *Ibid*: *N.* 1. (b) *Can*: 31. (c) *Lib*: 2. *Epist*: 1. *Thomassin Ibid. part* 4. *liv*: 3. *chap*: 12. *N.* 1. (d) *Ibid*: *N.* 2. (e) *Th*: *Aquin*: 20. 2*d*. *qu*: 100. *art*: 1. *sect*. 2. *S. Augustin*: *de Hæres*: *in Pr*: *S. Greg*: *in Reg*: *hab*: 1. *q.* 1. *&c. d.* 1. (f) *Ja*: 1. *Parl*: 7. *cap*: 107. *junct*: *Ja*: 6. *Parl*: 1. *cap*: 2. (g) *Mackenzie Criw*: *Part*: 1. *Tit*: 5. § 4.

ratry is an *Italian* Word, implying a kind of *Simony*, by corrupting of Ecclesiastick Judges.

4. The punishment of *Simoniacal* Pactions is deprivation and deposition. (*a*) And if made by the Intrant with the Patron, so as the Minister is cut off from a sufficient maintenance, answerable to the Value of the Benefice, the presentation may be refus'd; And the Lords of Session are to Judge in this matter. (*b*) And to determine what this Competency is. (*c*) Sir *George Mackenzie* concludes, that whatever is punished as *Simony* by the Canon Law, is punishable with us, and probable by Oath, because of the Clandestine Nature of this Crime. (*d*)

5. Some pretend to palliat their *Simony* by alledging that they do no more than purchase with Money the Temporality of the Benefice; Whom *Damian* doth with a great deal of Zeal confute. Others, to justify their *Simony*, object, that *Saul*, when he went to consult *Samuel* concerning his Father's Asses, and the Wife of *Jeroboam*, when she went to *Abijah*, to know what would become of her Son; Took Presents with them. To which Difficulties St. *Jerom* answers, That the *Israelites* who frequently consulted Diviners and Sooth-sayers, might have laboured under a mistaken apprehension, that the Prophets of the true GOD were no more accessible without Presents, than the Devils. Farther, 'tis not said that *Samuel* re-

(a) *C. sicut Simoniaca 6. Extr: de Simonia* (b) *Ja: 6. Parl: 21. cap: 1.* (c) *Mackenzie. Ibid: §. 31* (d) *Ibid.*

ceived

ceived any thing from *Saul*, but on the contrary he lodg'd and intertain'd him. And the Prophet *Abijah* was so far from accepting the Queen's Present, that he sent her away with a severe Reprimand, and the mortifying prediction of the death of her Son.

6. I need not travel out of our own Country to find Instances of *Simony*, which have sometimes been covered with very thin pretences. Witness, That *Richman*, who to elude the Canons, wager'd a great Sum of Money with King *James* the Fifth, that he should not be prefer'd to the first vacant Benefice; And thereby got himself made Abbot of *Holy-rood house*, and then Bishop of *Ross*.

7. All Benefices should be vacant before they are filled: (*a*) That there may be no *Votum captandæ mortis alienæ*; and the Provision should mention *modum vacandi*. (*b*) But the Pope took upon him to confer *Beneficia vacatura ex plenitudine potestatis*. To annul which Provisions, the *Act* 86. *Parl*: 11. *Ja*. 3. was made. A Gift of a Benefice in thir Terms, when the same shall happen to vake, is *ipso jure* null. (*c*) And a Presentation being made to one, and to another after his decease; The Substitution was found illegal and unwarrantable. (*d*) Albeit a Presentation to two persons conjunctly,

(*a*) *Tot: tit: de conceſſ: præbend: & Eccleſ: nondum vac: F. de Roye, ad tit: de jure Patron: Prolegom; cap:* 23. *Bengæus de Benefic: ad verb: conceſſa cap:* 1. *Pr: N.* 3. (*b*) *Arg. C. Presbyteri dist.* 24. *Mackenzie Obſerv: on the Act* 1. *Parl:* 22. *Ja:* 6. (*c*) *Hope Maj: Prat:* (d) 24 *January* 1677. *Stuart contra Nairn.*

and to the Surviver, would be sustained. By the twenty eighty Rule of the *Roman* Chancellary, *Tantum temporis post vacationem beneficii effluere debet quantum sufficit illam ad notitiam summi pontificis pervenire.* Which Rule the Lords sustained for the Reason of it, without regard to the Lawgiver. And therefore Mr. *William Melvil* Commendator of *Tungland*, his Provision to the Abbacy of *Kilwinning*, upon the death of the Commendator thereof, was found null: For that his Predecessor died at Five a Clock in the Afternoon of that day on which the Gift was dated; So that it was not probable the King could know so soon of the Vacancy. (*a*)

8. The first Years Rent of Benefices called *Annats*, us'd heretofore to be applyed to pious and publick Uses; but at length were claim'd by the Pope as his property. Some say *John* 22, others that *Boniface* 9. was the first who pretended to annex them as a fix'd Casuality to the See of *Rome*: But *Polydore Virgil* (*b*) runs their Original much higher. Annats were condemn'd and abolished by the Council of *Basil*, and the Pragmatick Sanction; but in a manner restored by the Concordat. They could not be exacted in *Scotland* without the Kings consent, who got the fifth Penny; and sometimes the Parliament dispos'd of 'em. (*c*) For even in the time of Popery, the absolute Authority of the *Roman* See was much limited by our Parliaments in matters

(a) *Spotswood Pratt: Title Kirk-Men and Kirk-Patrimony.* (b) *De Invent. Rerum, Lib.* 8. *Cap.* 2. (c) *Act* 4. *Parl.* 3. *Q. Mary.*

touching

touching upon the *Regale*. The first Fruits and fifth Penny of Benefices were allotted in the Year 1584 for establishing a Horse Guard to the King, (*a*) which is now paid out of the Excise. But Ministers provided to Benefices under Prelacies were thereafter declared free from Payment of these first Fruits, and fifth Penny: (*b*) And 'tis now long since any such Exaction was in *Scotland*. In *England* the Sovereigns pretence to the first Fruits was always kept up from the 26. Year of King *Henry* the Eight's Reign: Till of late, that Queen *Anne*, out of her Princely Compassion upon the mean condition of the inferior and poorer sort of her *English* Clergy, was graciously pleas'd to pass from it in their favours.

9. Annats with us being out of Doors, a benefic'd person has Right to the whole Years Rent, if he enter before *Whitsunday*; and to no part of it, if he be transported or depos'd. But he gets the half Year, if his Entry, or Transportation, or Deposition be after *Whitsunday*, before *Michaelmass*; and the whole, if he be transported or depos'd after *Michaelmass*. (*c*) But a transported Minister was found to have no Right to a Terms Stipend before his Collation, though after his Presentation, albeit he preach'd once before that Term: Having got the Stipend of the Church he was transported from. (*d*)

(a) *Act* 137: *Parl*: 8: *J*: 6. (b) *Act* 26: *Parl*: 11: *J*: 6. (c) *Stair Instit*: *Lib*: 2: *Tit*: 8: §: 33: *July* 24: 1662: *Weyms contra Cunninghame*. (d) *December* 12: 1676. *College of Glasgow contra Hereters of Jedburgh Parish*.

CHAP. VII.

What way Titles to Benefices are extinguished; and when they ceaſe to have Effect?

THE Canon Law doth make Benefices to vake many ways: But chiefly by the Incumbents Deceaſe; (*a*) or Deprivation; or Reſignation; (*b*) or by his being provided to two incompatible Benefices, whereof the firſt becomes void upon his attaining poſſeſſion of the ſecond. (*c*) The legal grounds of Deprivation with us are ſet down in the 132. and 133. *Acts, Parl.* 8. *Acts* 28. and 32. *Parl.* 11. *J.* 6. As to Reſignations, ſome were made reſerving to the Reſigner the Fruits of the Benefice by way of Penſion. Which method was condemned by the Canon Law; and yet the Popiſh Prelates at the Reformation finding themſelves going to be turn'd out, did demit their Benefices reſerving their own Liferents. Whereby the Benefices came to be neglected, ſince they who ſhould have ſerv'd the Cure had nothing for their Pains. To correct this abuſe, all ſuch Contracts were annulled by Authority of Parliament. And it was declared, that no proviſion thereafter to

(*a*) *Bengæus de Benefic: ad Verb: Conceſſa: C: 1: §: 8: N: 2: F: de Roye ad Tit: de Jure Patron: Prolegom: Cap: 23.* (*b*) *Ibid: Bengæus, Ibid: §: 9: N: 1. &c.* (*c*) *Ibid; §: 3. N: 3; Hope Maj: Pratt.*

any

any Prelacy not vacant by the poſſeſſors Deceaſe, Forfeiture, or ſimple Dimiſſion, ſhould be valid. (a) The Stipend of a Miniſter ſuſpended doth not vake: The Suſpenſion being only interpret to be *ab Officio, non Beneficio.* (b)

2. The time was, when the Goods of the inferior Clergy did at their Death fall as Caduciary to the Biſhop; and in like manner they did meddle with his, when he came to die. *Covarruvias*(c) doth inſinuate, that the Biſhops of *Spain* muſt have the Royal Aſſent, before they can diſpoſe in Teſtament of their Eccleſiaſtical Revenues; or dying Unteſtate can be ſucceeded therein by their lawful Heirs. And it was long a cuſtom even in *Scotland*, that the King ſucceeded as Executor to Biſhops: Which *William Landel* Biſhop of S. *Andrews* got diſcharg'd by King *David Bruce*; with liberty granted to Prelates freely to diſpoſe of their Goods by Teſtament, and to their neareſt of Kin to ſucceed them *ab Inteſtato.* The benefit of which priviledge he himſelf firſt enjoyed. Now by our Law Prelates, that is, all beneficed perſons may have Heirs, and Heirſhip-Moveable. (d) Tho the Act of Parliament (e) be only expreſs as to Barons, Gentlemen and Freeholders.

3. Benefic'd perſons have not only a Right to the profits of the Benefice during their In-

(a) *Act* 1. *Parl*: 9: *J*: 6. (b) *July* 26: 1661: *Ker contra Pariſh of Carident.* (c) *In Cap*: *cum in Officiis de Teſtam*: *N*: 9. (d) *Stair Inſtit*: *Lib*: 3: *Tit*: 5: §: 9: *Mackenzie Obſerv*: *on the* 54: *Act*, 7: *Parl*: *J*: 3: *November* 28: 1623: *Rig contra Mackenzie.* (e) *d*; *Act* 54.

cumbency

cumbency, and a power of Administration, or doing Deeds effectual after their Death, or remove: But also when they are gone, their Wives, Bairns, or neareſt of Kin, get a portion called the *Ann.* Which, from the Example of the *Saxon* Reformed Church, King *James* 6. introduc'd here by a Letter to the General Aſſembly ratified by them. This *Ann* is now determined to be half a Years Stipend or Rent of the Benefice, over and above what was due to the Defunct. That is, if he ſurvive *Whitſunday*, the one half of that Year is due for his Incumbency, and the other as Ann: And if he die after *Michaelmaſs*, the half of the next Year goes for the Ann. (*a*) But yet a Miniſter having ſerv'd the Cure till *Whitſunday*, was found to have no Right to that half Years Stipend; in regard he did not take the Teſt before the firſt of *January* 1682, as all in publick Office were appointed to do: (*b*) Albeit had he died before *January* 1682, his Repreſentatives would have had Right thereto as Ann. The Ann is equally divided betwixt the Relict and the Children; or failing theſe, betwixt her and the neareſt of Kin. (*c*) If there be neither Wife nor Children, it belongs to the neareſt of Kin, (*d*) and extends to the Rent of the Glebe, if there be no new Intrant,

(a) *Act* 13. *Parl.* 2. *Seſſ.* 3. *Ch.* 2. (b) *February* 1685: *Hume contra Galbraith.* (c) *Stair Inſtit. Lib.* 2. *Tit.* 8. §. 34. *Mackenzie Obſerv. on the* 4. *Act*, 3. *Parl.* 2. *Mary.* (d) *July* 6. 1665. *Colvil contra Lord Balmerinoch. June* 24. 1663. *Scrimzeour contra Executors of* Murray.

(*a*) other-

(*a*) otherwiſe not. For if there be an Intrant, both Manſe and Glebe belong to him; and neither of 'em fall under the Ann: unleſs the Glebe was ſown by the Defunct, and the Cropt upon the Ground at the Intrants Entry. (*b*) An Ann will be due, not only upon the Death of *Biſhops* and Miniſters; but of any other beneficed perſon; tho not upon a voluntar Renunciation of the *Benefice*. (*c*) It needs no confirmation. (*d*) Neither can it be diſponed to Strangers by the Defunct; nor affected by his Creditors. For it never belong'd to him, but is only a Gratuity the Law indulgeth upon the account that Clergy-men are not ſuppos'd to die rich. (*e*) Yet a penſion granted by a *Biſhop* was not only found due during his Life, but after his Death out of the Ann. (*f*) A *Biſhops* Ann comprehended only a Right to the Quotes of Teſtaments actually confirm'd in his Lifetime, or during the currency of the Ann. (*g*) Altho a Compoſition paid by an Appryſer, or the double Feu Duty by an Heir for their Entry, would not fall under the Ann, but belong to the Incumbent; For only the *Biſhop* himſelf could enter Vaſſals; whereas Teſtaments are confirmed by the Commiſſars without the *Biſhop*. And the Quote is due for the Confirmation.

(a) *July* 19. 1664. *Inter eoſdem. Stair, Ibid.* (b) *July* 6. 1665. *Colvil contra Lord Balmerinoch.* (c) *Mackenzie, Ibid.* (d) *July* 26. *Ker contra Pariſhioners of Cariden.* (e) *Mackenzie Inſtit. Lib.* 1. *Tit.* 5. (f) *February* 28. 1628. *Bairns of the Biſhop of Galloway contra Cowper.* (g) *July* 6. 1676. *The Biſhop of Edinburgh contra Wiſhart.*

CHAP.

CHAP. VIII.

Concerning Rights to Benefices that may be acquired from Beneficiaries.

BY the Canon and Civil Laws, the Patrimony of the Church is not alienable. (a) Except, 1. For payment of the neceſſary Debts of the Church contracted for upholding the Fabrick, and for the Defence of the Chriſtian Religion againſt the Inſults and Machinations of Hereticks or Infidels. 2. For a pious Cauſe, as to maintain the ſtarving poor, or to Ranſom Chriſtian Captives from Infidels. 3. For the greater Good of the Church; as where the Lands are not otherwiſe ſo improvable. (b) And becauſe Eccleſiaſticks finding themſelves but Adminiſtrators or naked Liferenters, might have poſſibly been tempted and prevailed upon, by the Influence of Friends and Kinſmen, to dilapidate their Benefices, to the prejudice of Succeſſors; their management and power of diſpoſing was, by the Canon Law, put under the Check of ſome Limitations. For no Prelate, whether Regular or Secular, could do any thing material, without conſent of his Convent or Chapter, and alſo

(a) *C. Sine Exceptione, 52. Cauſ. 12. Qu. 2. C. nulli liceat 5. Extr. de Reb. Eccleſ. non alien. l. 14. C. de SS. Eccleſiis.*
(b) *Gloſſ. in Cauſ. 12. Qu. 2.*

of

of the Patron, if there was one ; (a) nor inferior Beneficiary, without consent of his Patron. And even Deeds done with consent as said is, were lyable to certain Restrictions of time, and an Onerous Cause ; and to be performed with solemn Formalities.

2. All Ecclesiastical persons entring to Benefices at the Kings Presentation, were ordained to find Caution, before expeding of the Signature, to leave the Benefices in as good case as they found them. (b) Ministers are expresly discharg'd to dilapidate their Benefices, by setting them in Feu or Tack, with Diminution of the Rental paid at their Entry, under the pain of Deprivation ; besides the Nullity of the Right. (c) And Rights of that nature granted by Prelates are also null. (d) To elude which, the benefic'd person did not give down of the Number of the Rental Bolls, but converted them to Money at very inconsiderable prices. For obviating whereof, such Conversions of Victual Rent into Money below the true value was prohibited. (e) But the price that the Bolls gave the time of the Conversion is only considered : Since both Parties took the hazard of the rising and falling thereof. And the Sum mentioned in the Conversion is presumed to be the true value, unless it can be proven, that the Victual then sold at higher prices. (f) The dismembring any part of a Benefice

(a) *Craig Feudor. Lib.* 1. *Dieg.* 1. (b) *Act* 11. *Parl.* 10. *J.* 6. (c) *Act* 101. *Parl.* 7 *J.* 6. (d) *Act* 11. *Parl.* 10. *J.* 6. (e) *Ibidem.* (f) *Mackenzie Observ. on the* 11. *Act* 10. *Parl. J.* 6.

is declared a Dilapidation. (*a*) But since all that Law requires of a Beneficiary is, that he do not prejudge his Successors, by leaving the Benefice under a less Rental and Value than he found at his Entry: His granting of Rights according to the Original Rental, or Feu Duty at his Admission to the Benefice, will not be constructed a Diminution; tho the same has been improven & augmented during his own Incumbency. So it was found no Dilapidation in a Bishop, to pass from Certification obtained by him in an Improbation against his Vassals, and to give a new Charter for the old Feu Duty. (*b*) S. G. *Mackenzie* is of Opinion, (*c*) that such a new Right ought to be sustained, tho made by the Successor of him who obtained the Certification; and that, for the same Reason, Rights flowing from benefic'd persons after Reduction obtained by them *ob non solutum Canonem*, are good and unquarrellable. But it wou'd seem, that Bishops could neither dilapidate their Benefices directly, nor yet indirectly, by omitting lawful Defences in a Process; and that therefore *Competent* and *Omitted* was not relevant against their Successors.

3. No Ecclesiastick should grant any Right to his Benefice, till once he is compleatly invested in his Office. And by the *1st Act*, 22. *Parl. J.* 6. A Bishop had no Right to the

(a) *Act* 3. *Par.* 18. J. 6. (b) 27. *January* 1676, *Bishop of Caithness contra Innes.* (c) *Observ. on the* 101. *Act*, *Parl.* 7. J. 6.

Temporality

Tepmorality, till after his Conſecration. Yet it would ſeem that Biſhops elect, and Biſhops poſtulat us'd to diſpone or ſet long Tacks of their Kirk-Lands; ſince they are Diſcharg'd to do ſo by the 77. *Act*, 9. *Parl.* Queen *Mary*. And Biſhops elect, *Exercent ea quæ ſunt juriſdictionis; ſed non ea quæ ſunt Ordinis.* (a)

4. Becauſe the Popiſh Clergy at the Reformation were put from their Benefices; They were declar'd free of Warrandice, except from their own Deeds, or Rights granted by them, of, or concerning their Temporalities, annexed to the Crown by the General Annexation 1587, (b) which was done only *in majorem cautelam*. For by the common Law they could not have been reached for eviction proceeding upon a ſupervenient Statute, (c) And nothing can infer Eviction or Recourſe, but what had a Cauſe anterior to the Warrandice. The Loſs or Gain by all caſual Superveniencies being the Purchaſers; unleſs where the Contrary is expreſt. Church-men ſhould warrand all Rights made for onerous Cauſes by themſelves, or their Predeceſſors in Office to him who is in poſſeſſion by vertue thereof. The Biſhop and Chapter are conjunctly lyable to warrand Deeds done by him with their conſent: But the Biſhop alone, without the Chapter is not. Nor is a Patron bound to warrand Rights granted by the

(a) *Greg. Tholoſ. Syntag. jur: Part* 2. *lib.* 15. *cap.* 12. *N.* 23. *Mackenzie Obſerv. on the* 77. *Act.* (b) *Act* 29. *and* 110. *Parl.* 11. *J.* 6. (c) *Mackenzie on the ſaid* 29. *Act.*

Beneficed

Beneficed person with his Consent. Church Lands being disponed with absolute Warrandice, the Disponer was found oblidged to Warrand from an after designation of a Glebe: tho it was alledg'd that the same was evicted *ex natura rei*, and not *ex defectu juris*. But no Recourse was allowed against him upon a Designation for Horse and Cows Grass to the Minister, conform to the 21 *Act*, 3*d Sess.* of King *Charles* the 2*ds* first *Parliament*. (*a*) The Reason of the Disparity was, because the *Act* 21 was a Supervenient Law, and declared to be Effectual from the year 1649, only as to Manses, and not as to Horse or Kines Grass. But then since the Retrospect is not expressly in favours of Glebes, it would seem that they also should have been determin'd by the common Law.

5. Rights of Benefices acquired from Beneficiaries are either absolute, and perpetual, or temporary. The Latter is constitute by Tacks or Pensions; The other by Disposition or Adjudication; and both by Possession. I begin with absolute Rights.

(*a*) *Dirleton Decis.* 15. *July* 1667.

SECTION

SECTION I.

Of Diſpoſitions and Feus granted by Eccleſiaſticks of the Temporality of their Benefices.

A Diſpoſition of Church-Lands is a voluntary Alienation thereof, to be holden of the Diſponer, or of his Superior, either Feu, or Ward, or Blench, and containing ordinarly a Precept for Infeftment, both the ways of *A me*, and *De me*: The one baſe, and the other publick. But a publick Infeftment in Lands to be holden of the Diſponers Superior, is null until it be Confirm'd by the Superior. (*a*) Nor will a baſe Infeftment without Confirmation exclude Recognition, or the caſualities of Ward, Non-entry and Liferent Eſcheat, falling to the Superior by the Diſponer's Death and Rebellion. And in a Competition upon ſeveral Confirmations, the laſt Right firſt Confirm'd will be preferd.

2. All Feus of Church-Lands before the year 1558 (when the Reformation began) not Confirm'd, either by the King or the Pope, are declared null. (*b*) Not as if the Popes Confirmation had been ever neceſſary by any poſitive Law with us. He us'd indeed

(a) *Act 66. Parl. 5. J. 6.* (b) *Act 71 Parl. 9. J. 6.*

to

to Confirm Rights made of Church-Lands: But that was a Priviledge he had uſurped, as pretending to the univerſal Superiority & Patronage of all Benefices; and to the ſole Right of beſtowing them, contrary to their own Canon-Law. (a) For Feus of Church-lands prior to the Reformation, were and are valid without any ſuch Confirmation. The *Act* 7. *Parl.* 9. *J.* 6. being only made to obviate the Dilapidation of Benefices, which was frequent about the time of the Aboliſhing of Popery. It wou'd appear from the Narrative of the 190 *Act*, 13. *Parl. J.* 6. That we had no antient Statute or Conſtitution, requiring either King or Popes Confirmation to Eccleſiaſtick Feus: But the neceſſity of the King's Confirmation is clear from *R. Majeſtatem*, Lib. 2. Cap. 23. for ſuch Lands are *de Eleemoſyna Regis*, and preſumed to have been given by our Kings for praying for them, and therefore ſhould not be inverted to another uſe without their conſent. Which Priviledge the Pope in his arbitrary manner, did afterward aſſume to himſelf.

3. By an *Act* of Secret Council, *September* 10. 1561, and the 2. *Act*, *Parl.* 1. *J.* 6. The ſeeking Confirmations from *Rome*, was Diſcharg'd under the pain of *Barratry*. And in Queen *Maries* tenth Parliament 1564, the Queens Confirmation of Infeftments given ſince the 8 of *March* 1558, is declared Equivalent to the Popes in former times; and his

(a) C. *non liceat Papæ* 12. *qu.* 2.

Confirmations

Confirmations after that year, are declared invalid. By the 7. *Act*, 9. *Parl. J.* 6. all Feus of Church-lands, not confirm'd by the King, are null by way of Exception. But this *Act* was afterwards restricted and qualifyed by the 187. *Act*, *Parl.* 13. *J.* 6. which allows no such Feu-Infeftment granted by Prelats of old, and Authoriz'd by the consent of King *James* the *fifth*, or any of his Predecessors under the Privy Seal, to be quarrelled for want of Confirmation. Tho the Acts of Parliament be only express as to the Confirmation of Feus; Long Tacks for three Nineteen years (as *Balfour* in his Pratticks observes) are esteem'd Alienations, and should be confirm'd. Yet in regard the Acts only require the Confirmation of Church-Lands, The Lords inclined to think, that Feus of Salmond-Fishing needed no Confirmation. (*a*) And found an Infeftment in an Office of Forrestry, whether holden Feu, or Ward, with a Duty out of the whole Lands of an Abbacy, to be valid without Confirmation. (*b*) Nor was the Circumstance *that the Duties of the Office affected the Lands*, thought material. Seing a Constitution of Thirlage upon the Lands of the Abbey, to a forreign Miln for a Thirled Duty, would not have been Null for want of Confirmation. And yet at this Rate, the Abbot might have eluded the Law, and exhausted the Benefice. I find it not decided, whe-

(a) *Mackenzies Observ. on Act* 7. *Parl.* 9. *J.* 6. (b) *January* 20. 1666, *Lord Rentoun contra Feuers of Coldinghame*,

ther Infeftments of Church-Lands holden Ward need Confirmation or not; Nor ſhall I interpoſe my Judgement in the point: But Sir *Robert Spotſwood* ſays, (*a*) That Confirmation of Kirk-Lands is only mean'd of Feu-Lands. The Charter of Confirmation was not probative, except the confirm'd Charter was produc'd; and if the Confirmation was granted by the Popes Legate, or any Commiſſioner; the Commiſſion behov'd alſo to be produc'd. (*b*) Proceſs was ſuſtained in a Removing from Church-Lands, upon a Seaſin confirm'd after the Warning, but before the Summonds. (*c*) Whether a Law requiring Confirmation to Feus of Eccleſiaſtick Benefices, was abſolutely neceſſary before or ſince the Reformation, or not: There was good reaſon for it about the time of the Reformation, when the Popiſh Clergy foreſeeing clearly that their own Intereſt in theſe Benefices could not laſt or ſtand long, did prodigally Feu them out to their Friends.

4. No Prelate could Feu out any part of his Benefice without conſent of the Chapter or Convent; at leaſt of the moſt part of the Members beſide the Setter, (*d*) Whereof ſuch as had two Benefices had two Votes. (*e*) But perſons ſubſcribing as Members of the Chapter, are preſum'd in Law to be Members, and alſo the

(a) *Prat. Title, Confirmation of Kirk-lands.* (b) *Ibid.* (c) *Ibid.* (d) *Craig Feud. Lib.* 1. *Dieg.* 11. *Stair Inſtit. lib.* 2. *tit.* 8. §. 17. (e) *Craig ibid. Mackenzie Obſerv. on the* 2 *Act*, 22. *Parl.* J. 6.

Majority,

Majority, unleſs the contrary is proven: And this Majority is to be calculated without reſpect to Minors, or Abſents out of the Countrey. (a) And if there be no Chapter or Convent, the Prelats Deed is ſufficiently formal, having the common Seal of the Convent appended with the King's Confirmation. (b) For of old the Appending of the common Seal did ſerve for the Chapters conſent, that being never done but at a ſolemn Meeting when the Members were *capitulariter congregati*, all preſent, and the plurality conſenting. But at length to obviat Fraud and Forgery, to which Deeds only Seal'd were obnoxious; Subſcribing was enjoyned by Act of Parliament. (c) Yet it continued the peculiar Priviledge of the Arch-biſhop and Chapter of St. *Andrews*, that their Seal did ſupply their Subſcription. (d) The Canon Law required a Chapterly Convention to the Authorizing of a Prelats Deed; as if *emendicata ſuffragia, et ſeparatim impetrata*, did not import a Conſent. But this is not only tacitely diſpens'd with by our Cuſtom, as *Craig* (e) obſerves: but even by an expreſs Statute. (f) Nay, farther; an Inſtrument of Reſignation of a part of a Benefice was ſuſtained, tho of a date poſterior to ſome of the Subſcriptions in the Procuratorie. (g) But no Subſcription by any

(a) *Stair ibid. Mackenzie ibid.* (b) *Craig ibid.* (c) *Craig ibid.* (d) *Act* 3. *Parl.* 18. *Act* 8. *Parl.* 19. J. 6. (e) *Lib.* 1. *Feud. Dieg.* 11. (f) *Act* 3. *Parl.* 18. J. 6. (g) *Nov.* 16. 1624. *Hope contra Miniſter of Craighall.*

of these Consenters will avail, if obtained after the death or deprivation of the principal Granter of the Right, or of any of the other Subscribers. For they cannot be said to consent who are not alive, and in Office together at the time, and where many subscribe separately as Consenters, the last consent is drawn back to the first. (a) And therefore if a Prelate having granted a Right in Favours of one, without the Majority of his Chapter subscribing, shall change his mind, and dispone the same thing again to another with a full Chapterly consent; The second Right will be preferred: Altho the first came afterward to be perfected by the due complement of Subscriptions. (b) Rights granted by beneficed persons in manner foresaid, were sufficiently valid even in time of Popery, without the Pope's confirmation: Albeit many persons for farther security took Confirmations.

5. The Generality of Feudalists are of Opinion, that tho these Cautions and Solemnities must be observ'd in the first Alienation of a Benefice, yet that if the same shall afterwards return to the Church, through the Vassals Delinquency, or otherways; it may be sewed over again by the Prelate without consulting his Chapter. But *Craig* (c) is clear, that according to our Custom, the consent of the Chapter is requisite, *Tam in renovatione quam in alienatione feudi.*

(a) *Craig Ibid:* Mackenzie Observ: on the Act 2. Parl: 22. Ja: 6. (b) *Craig Ibid.* (c) *Ibid.*

6. A

6. A Chapterly consent was not only an indispensable Formality in the Deeds of Prelates; but also necessary to Legittimate and Strengthen the Deeds of the Subaltern Members of the Chapter.(a) And as nothing could be done by the Prelate without consent of his Chapter, or most part thereof: So neither could the particulars Members of the Chapter do any thing in their private Benefices without consent of him, and the Plurality of the Chapter: Except the Members of the Chapter of the Archbishop of St. *Andrews*. (b)

7. It is an ordinary Question, whether *sede vacante*, while there is no Prelate, the Chapter or Convent might do what he could have done with their consent ? And the Answer is, That during the Interval of a vacant Prelacy, the Right of Administration in Spirituals is indeed lodg'd in the Chapter, as to Benefices pertaining to them and the Prelate in common; but not where they belong'd to him alone; (c) Such as Mensal or Patrimonial Churches. Neither can the Chapter receive Resignations; that being the Prelates Prerogative. But they may conferr Benefices fallen to the Bishop *jure devoluto*, since that happens *ratione jurisdictionis*; and may also give Collation upon the Patron's presentation; and in all other cases, where the Bishop himself might be compelled to do it: (d) For the Dean of the Chapter, while the See is vacant, is the

(a) *Stair Inst: lib: 2. tit: 3. §. 17.* (b) *Mackenzie Ibid:* (c) *Craig Ibid.* (d) *Hope Maj: prat.*

Bishops

Bishops Vicar General, and has the same power he had *in spiritualibus*, and in matters *quæ sunt necessariæ jurisdictionis*. As to the disposing of the Temporality by granting voluntary Rights, the Deed of the Chapter is not sufficient: For the Fruits and Profits *sede vacante* fall to the King, or to the proper Patron. (*a*) Therefore a Feu granted by the Vicar General, with consent of most part of the Chapter, while there was no Bishop, was reduc'd: As being a voluntary Deed, that requir'd to be Authoriz'd by the Prelate himself. (*b*) Nor would the Lords sustain the Queens Confirmation obtained after intenting of the Reduction, to supply the want of the Bishops consent, the same being only general, and in common Form, without mention of supplying of the foresaid Defect. (*c*)

8. As Prelats with consent of their Chapters or Convents are Impower'd to grant Feus of their Benefices; The like may be done by Inferior Ecclesiasticks, such as Parsons, Vicars, and others, with consent of their Patrons. (*d*) And tho I reckon'd Provosts among Prelates, (*e*) it must be considered that they are so far of an inferior Order, That Deeds done by them require the Patrons consent, if there be one, as well as the Chapters. (*f*) But yet Patrons may gift away Prebends without the concurrence of the Provost, or Canons; unless

(a) *Craig Ibid:* (b) *Spotswoods Pratt: tit: Kirkmen and Kirkpatrimenie:* (c) *Ibid.* (d) *Craig Ibid.* (e) *Supr: chap:* 5. *N.* 3. (f) *Stair Instit: lib:* 2. *tit:* 8. §. 19.

it

t be otherways provided by the Foundation. (*a*)

9. It is much queſtioned, if any Eccleſiaſtick without his proper Conſenters, may better and improve the Condition of his Benefice? Some think ſuch a Feudal Contract would be *ipſo jure* null, as if it had been done by a Minor having Curators, without their conſent; Others alledge the contrary, and that as a Minor may without conſent of his Curators make his condition better, and contract profitably, ſo may a Church-man without conſent of his Chapter or Patron. I ſhall not be poſitive in the Matter, becauſe the Learned *Craig* is a *non-liquet*, tho he ſeems to incline moſt to the latter Opinion. (*b*)

10. The King grants Infeftments upon Reſignation, *periculo petentis*, who gets no farther Right than the Reſigner had. But an Infeftment of Kirk-lands by vertue of a Charter ſubſcrived by an Abbot, with conſent of his Convent, proceeding upon Reſignation without a a ſpecial *Reddendo*, and only relative to the former Infeftment, was ſuſtained. (*c*) For the King and Kirkmen are in a different caſe; and things paſs not His Majeſties hand *ex certa ſcientia*.

11. Biſhops were allowed to Feu out their Ward-lands, when they were barren, to a competent avail; That is, for the retoured Duty at leaſt, *Act* 9. *Parl*: 23. *Ja*: 6. But this

(a) *Mackenzie Obſerv: on the* 12. *Act* 1. *Parl*: *Ja*: 6. (b) *Craig Ibid.* (c) *January* 17. 1666, *Lord Rentoun contra the Feuars of Coldingham.*

Statute

Statute was Temporary; For under the laſt Eſtabliſhment, Biſhops could neither Feu nor Tax their Ward-lands. Both theſe being looked upon as Deeds of Dilapidation.

SECT. II.

Of Tacks granted by Eccleſiaſticks of the Temporality of their Benefices.

A TACK is a Contract of Location, whereby one grants a Right to the Uſe or Profits of any thing during a determined time to another; For payment of a certain Hire, called, *The Tack-duty.* We term the Granter of the Tack the *Setter,* and the Receiver the *Tackſman.*

2. The granting of Tacks or Leaſes by Eccleſiaſticks to Secular Perſons, was once a rare thing: For when the Clergy lived in community, they cultivated their Lands with their own Hands. (*a*) But at length Tacks by Clergy-men of the Rents of their Benefices turn'd ſo frequent, and withal ſo pernicious to the State of the Church; That Laws were made for regulating and reſtricting that practice. Which required to the Validity of theſe Tacks, that they be not ſet with diminution of the Rental, (pay'd at the Setter's Entry) whether for fewer Bolls, or at an undervalued price; That

(a) *Bengæus de Beneficiis ad verb: cum ſuo Reditu cap.* 3. §. 13. *N.* 1.

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the Major part at leaſt of the Chapter, or Conventual Brethren conſent, if the Deed is granted by a Prelate; and if by an inferior beneficed perſon, that the Patrons conſent be interpoſed; and the other circumſtantial Solemnities obſerved as in the caſe of Feus. Becauſe it might have been pretended, That however Beneficiaries were tied up from leſſening the fix'd and conſtant Rent of their Benefices by Tacks, to run after their time; yet the Caſualities of the Benefice fell not under the Prohibition. By the 5. *Act* 22. *Parl: Ja:* 6. Tacks ſet thereafter by Biſhops of their Quots of Teſtaments, and other Caſualities, are null, and no longer effectual than during the Setters Lifetime. A Biſhop cannot ſet a new Tack before the old one is expired, more than a Right to the Benefice can be conveyed while its fall. For the beneficed perſon ſo long as the Tack ſtands, has only Right to the Tack-duty. (*a*) Sir *John Nisbet* (*b*) ſtates the Queſtion, Whether Biſhops finding ſtanding Tacks of their benefice at their Entry, may ſet new Tacks after expiring thereof: The benefit being the ſame by the New Tacks as by the former? But Sir *James Stuart* (*c*) thinks the caſe is not the ſame, and that they might by the like Reaſon prorogate the old Tacks: But the Act of Parliament regulates this Matter. Sir *John* (*d*) likewiſe moves this doubt, If a *Biſhop*

(a) 20 *March* 1683. *Biſhop of the Iſles contra the Tackſmen of the Tithes of that See* (b) *Doubts in the Law Title Dilapidation.* (c) *Notes upon the Doubts.* (d) *Ibidem Title Biſhops.*

upon

upon the point to be tranſlated, may accept a Renunciation of a Tack not expired, and grant a new Tack for more years, in prejudice of his Succeſſor? As to which this is certain, That he could do nothing *in fraudem* of his Succeſſor. And tho it was an ordinary thing with a Biſhop to ſet Tacks, after he knew himſelf recommended to another See; it was down right Fraud, and ſhould not be allowed. Otherwiſe the Intrant Biſhop could not expect, but to find all his Patrimony exhauſted by ſuch Tacks. A Biſhop having formerly conſented to a Tack, when himſelf was a Member of the Chapter; cannot quarrel the ſame after his Promotion, for Diminution of the Rental, or Converſion of Bolls into Money, or upon any ſuch like Account. For the Chapter being *quaſi Tutor*, every Member is bound, at the giving of his conſent to Deeds, to enquire if the ſame be for the Advantage of the Church; and ſo cannot be allowed, when he comes to be a Biſhop, to call in queſtion what he once, in the inferior Capacity of a private Canon, acknowledged to be fit. (a)

3. To check and reſtrict the boundleſs liberty taken in ſetting of Tacks for many Liferents and nineteen Years; by the 4. *Act*, 22. *Parl*, *J.* 6. Biſhops and other Prelates are diſcharg'd to ſet longer than 19. Years, and inferior benefic'd perſons for longer ſpace than their own Lifetime, and five Years thereafter,

(a) *Mackenzie Obſerv: on the Act* 4: *Parl:* 22: *J:* 6.

(except

(except by Order of the Commission) under the pain of Deprivation. And farther, the Contraveeners are declared Infamous, and Incapable of any publick Church Office. Longer Tacks were ordained to be Registrate within 40. days in a particular Book to be kept by the Clerk Register for that effect; otherwise to be null. But then a Tack set by one of the inferior Clergy for longer space than this Act allows, was not declar'd null; but only the punishment of the Statute incurr'd by the Contraveener; and Registration thereof in the Books of Council and Session sustained as sufficient, in regard the Clerk Register had not made a particular Record for that effect, in the Terms of the Act. (*a*) Tutors, Curators, Factors or other Administrators of other Mens Affairs, cannot set Tacks for a longer time than their Office continues. (*b*) But here we see, that Church Men may; tho these are even but naked Administrators. As Prelates are bound up by the foresaid Act from granting Tacks of a longer Endurance than 19 Years: So neither can he set for that space, without consent of their Chapter or Convent, at least of the plurality of the Members, besides the Setter. And when we say, that the inferior Clergy can set Tacks to run five Years after their Decease: That is always to be understood with consent of the Patron, whether Laick or Ecclesiastick; (*c*) obtained ei-

(a) *November* 9: 1624: *Hope contra the Minister of Craighall.* (b) *Craig: Feud: Lib:* 2: *Dieg:* 10; *Stair Instit: Lib:* 2: *Tit:* 9: §: 3. (c) *Act* 15: *Parl:* 23: *J:* 6.

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ther before or after the setting of the Tacks. (a) For without that, they can set but three Years Tacks. (b) The Reason is, because it was thought the Patrons Interest, to see to the right Administration of the Benefice; that, upon the Incumbents Death, he might the better find an able Man to supply the Cure. And by the Canon Law, the Administration belongs to the Patron; he is to be alimented, if he fall poor, out of the Rents of the Benefice, and takes an Oath of the person presented to preserve and not dilapidate the Temporality thereof. Besides, it were hard so far to slight a Patron, as not to require his consent to the Alienation of a Benefice of his own Endowment. Which would discourage others to bestow their Liberality that way.

4. It was once debated before the Lords, (c) but not decided; whether a Commission to set Tacks granted to a Parson by his Patron, were sufficient to authorize Tacks made by the Parson for longer than three Years. It was alledg'd, that no Commission from the Patron could have that Effect, more than he could Renunce the benefit of the Act of Parliament, and leave the Parson to himself. In regard, as Curators cannot authorize their Minors by Commission: So neither can the Patron, as *Curator Ecclesiæ*, so authorize

(a) C: 20: *Extr: de Jure Patronat: Mackenzie Observ: on the* 200: *Act*, 14: *Parl:* J: 6. (b) *d: Act* 200. (c) *July* 6: 1666: *Parson of Morum contra the Lairds of Beirford and Beinstoun.*

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the Beneficiary. And the Law requiring his consent to the Deeds of the Incumbent, was not calculated so much for the Patrons private Interest, as for the Good and Advantage of the Benefice. As it is not necessary for the Patron to be consenting at the subscribing of the Tack; but his consent may be adhibited either before or after: So it is sufficient, that this subsequent consent be either Express, by subscribing the Tack; or Tacite, by Deeds of Homologation. For a Patrons consent was infer'd from his accepting a Right to the Tack: (*a*) Altho this be authorizing *in Rem suam*. A Tack made by a Parson for more than three Years, was sustained as sufficiently authoriz'd by the consent of one as Patron, in whose favours another was decerned to denude himself of the Right of Patronage; so as the succeeding Minister could not quarrel the same. (*b*) But prejudice to any deriving Right from the person ordained to denude, to claim preference as to the Patronage: The Decreet being only the ground of a personal Action against him for denuding. Tacks set by inferior beneficed persons for more than three Years without the Patrons consent, would seem by the *Act* 200. *Parl.* 14. *J.* 6. to be simply null: Yet such were found valid as to three Years. (*c*) As Tacks of Burrow Rents (tho declar'd null by the 36.

(a) *January* 19: 1669: *Earl of Athole contra Robertson of Strowan.* (b) *In the foresaid Case of the Parson of Morum against the Lairds of Beirford and Beinstoun.* (c) *July* 18: 1668. *Johnstoun contra Howdoun.*

Act,

Act, 3. *Parl. J.* 4. if set for a longer time than three Years) should be sustained, if restricted to three Years. (*a*)

5. All Tacks must express the Contracters Names, Tack Duty, Ish and Entry. But the want of an express time of Entry vitiats not the Tack: For in such a case the Entry is understood to be from the Date, or the next Term. (*b*) A Tack wanting a Duty is null *quoad* singular Successors. (*c*) And *Craig* is of Opinion, that a Tack set by a Prelate, tho for a Duty, is null, if the same be assign'd to the Tacksman. (*d*) But yet a Tack bearing a Discharge of the Duty was found valid: Altho the Discharge would not secure at the Hands of a singular Successor; but would only operate against the Setter and his Heirs. (*e*) Since all Tacks must have an Ish, if they be set to a determined time; and that being elaps'd, to continue during the not payment of a Sum, or performance of a Deed: They are only effectual for the definite space expreſt. (*f*) A Tack during pleasure lasts no longer than the Setters Lifetime; *Quia voluntas morte extinguitur.* (*g*) But may be revoked sooner, if the Setter think fit. A beneficed person who sets a Tack to begin after the Ish of a former, if he died *medio tempore*; the second

(a) *Mackenzie Observ: on the said* 36: *Act.* (b) *December* 4: 1629: *Oliphant contra Peebles*: *Stair Instit*: *Lib*: 2: *Tit*: 9: §: 30. (c) *Ibid*: §: 29. (d) *Feud*: *Lib*: 2: *Dieg*: 10. (e) *January* 31: 1627: *Ross contra Blair.* (f) *Craig, Ibid.* (g) *Spotswood Pratt*: *Title Tacks, Heretrix of Murray contra the Tutor of Sanquhar.*

Tack

Tack would be null: The Entry on't being confer'd *in tempus indebitum* after the Setters Deceaſe, when he could have no Right. (*a*) For as Tacks ſet by benefic'd perſons, who are not *in titulo* the time of the Entry, are void and null: So the Entry cannot begin either after their Deceaſe, Dimiſſion, or Deprivation, ſo as to oblige Succeſſors to ſtand thereto; but only while they are in poſſeſſion.

6. Tacks before they are clothed with poſſeſſion, are only conſidered in Law as other perſonal Rights; and are not effectual againſt ſingular Succeſſors. But Tacks granted by benefic'd perſons are real Rights without poſſeſſion, and will defend their Succeſſors in Office. (*b*) For theſe are not properly ſingular Succeſſors; ſince they do not acquire or purchaſe, but Succeſſors *Titulo Univerſali*; not unlike ſingle Incorporations, who are tied by their Predeceſſors Deeds: Or perhaps the Reaſon is, becauſe Beneficiaries are but Adminiſtrators, and it is the Church that ſets.

7. Some Tacks are called Rentals, as being the Conſtitution of fix'd Rents. The Tackſman is term'd Rentaller, to whom the Heretor indulges the priviledge of a kindly Tennent, or whoſe Predeceſſors have been antient Poſſeſſors and kindly Tennents. He pays a Graſſum, or ſome Acknowledgment at his Entry. Rentals run longer than ordinary

(a) *June* 18. 1629. *Dunbar contra Turner.* (b) *Dirleton Doubts, Pag.* 195.

Tacks;

Tacks; but if no time be expreſs'd, they endure only for a Year: (*a*) Except in Eccleſiaſtick Feus, where they are preſum'd to be Liferent Tacks. (*b*) Rentals not expreſly conceived in favours of Heirs, reſolve in naked Liferents. (*c*) And thoſe mentioning Heirs indefinitely, extend only to the firſt Heir. (*d*)

(a) *Mackenzie Inſtit: Lib: 2: Tit: 6:* (b) *Craig: Feud: Lib: 2: Dieg: 9.* (c) *Act 68: Parl: 11: J: 6: Mackenzie Obſerv: on the ſaid Act.* (d) *March 13: 1632: Ahannay of Kirkdale contra Aiton: Mackenzie, Ibid.*

SECT. III.

Of Eccleſiaſtical Penſions.

AN Eccleſiaſtical Penſion is a certain Portion, or yearly Rent payable for a time, out of anothers Benefice. The Word *Penſion* comes from *pendere*: Either becauſe it formally depends upon theBenefice, as a *jus uſusfructus* upon the Property; or *quod ſtatis temporibus pendi ſoleat.*

2. The Origine of Eccleſiaſtical Penſions is not ſo very clear; But they ſeem to have been introduc'd at firſt, as a mean of Subſiſtence to Incumbents, who through Sickneſs or Infirmities of old Age were turn'd unable to Officiat. For ſuch were allowed to reſign their Benefices, reſerving to themſelves Penſions out of 'em, as they might Live upon ſuitably

ably to their former Character. As Churchmen afterwards turn'd more Degenerate, and Benefices became Merchandize; Resignations and Pensions upon more trivial Reasons were Sustained. When two Benefices were excambed, the greater or fatter *Benefice* was burden'd with a Pension in favours of the lesser, to adjust and make them Equal. If the Right to a Benefice was contraverted, it was made lawful to compound the Matter by imposing a Pension upon the Benefice in favours of the Competitor.

3. The Pope that great Usurper of Ecclesiastical Rights, pretending to the sole Power of burdening *Benefices* with Pensions, did exerce it so frequently, and arbitrarily in favours of such as gave him Money; that the increasing of Simoniacal Pensions turn'd a Grievance here intolerable. For Remedy whereof, K. *James 1st.* reserv'd to himself the Cognition of Pensions obtain'd at *Rome*. (*a*) And by the 4 *Act*, 1 *Parl. J.* 3. No Pension could be purchased out of any *Benefice* without consent of the Possessor. Ecclesiastical Pensions Authoriz'd by Decreets or Possession, were not prejudg'd by the general Annexation. (*b*) And those granted out of Prelacies, not Authoriz'd by Decreet or Possession in the Prelats Life, and before the *Act* of Annexation were Null. (*c*) But yet Possession of a part of the Pension, though only for a Term

(a) *Act* 1, *Parl.* 1. *J.* 1. *in the Edition of the black Acts.* (b) *Act* 29. *Parl.* 11. *J.* 6. (c) *Act* 137. *Parl.* 12. *J.* 6.

before that *Act* was found relevant to sustain the whole. (*a*) The Lord *Dirletoun* (*b*) states it as a Disputable Point, if a *Bishop* will be personally lyable, or at least if his Rents be affectable for the bygones of an Annual-rent, payable out of the *Bishoprick* to a pious Cause; which had fallen due, and run on in his Predecessors time? Her Majesties Advocat's Opinion (*c*) is, that the Bygones of a simple Pension will not affect the Bishops Successors; And he doubts if a Bishop can grant a Pension really affecting the Lands or Teinds of the Bishoprick. Pensions granted by Church-men should be special as to the Tenents names, and Duties. (*d*)

4. *By* the Canon Law, Pensions affecting *Benefices* of Cure, *Extinguuntur morte gravantis*, that they may not ly as a Discouraging burden upon the next Intrant. And with us *Bishops* could not burden their *Benefices* with Pensions for a longer time than their Right lasted; that the Successors might not suffer prejudice by any Deed of theirs. (*e*) *But* Liferent Pensions given by *Benefic'd* persons, are not only due during their Life, but after their Decease out of their Ann. (*f*)

5. We observe this Difference betwixt Secular Pensions granted by Laicks, and Ecclesiastick *Pensions* granted by Church-men:

(a) *December* 17. 1628, *Chalmers contra L. Craigievar.* (b) *Doubts title Bishops Debts.* (c) *Notes upon the Doubts.* (d) *Mackenzie Observ. on the* 29 *Act.* 11 *Parl. J.* 6. *P.* 232. (e) *Act* 3. *Parl.* 18. *J.* 6. (f) *February* 28. 1628, *Bairns of the Bishop of Galloway contra Cowper.*

That

That the former without Infeftment thereon, are but of the nature of Assignations, producing personal Action against the Granter, and his Heirs; and ineffectual against singular Successors. (a) Or against the the Terce of the Constituents Relict. (b) But Ecclesiastick Pensions clothed with Possession, or Decreets conform in the Constituents Life, are valid against their Successors in Office. (c) So a Pension granted by a Bishop, with a power to assign *etiam in articulo mortis*, was sustain'd in favours of an Assigney after the first Pensioners death, against the succeeding Bishop. (d) But not where neither the Assignation was Intimate, nor possession attained by the Assigney before the Cedents Death. (e) And a Pensioner *cum potestate transferendi* having granted Assignation, reserving his own Liferent, or to take effect after his Death: the Assignation was declar'd null by way of Exception, even after a Decreet conform, and 30 years possession. In regard the Assigneys Entry was confer'd *in tempus indebitum*. (f) But an Assignation to a Pension was sustained, albeit the Cedent died in the Possession; in regard the Assignation was intimated by a Summons before his Death. (g) A Decreet

(a) *July* 9. 1629, *Urquhart contra E. of Caithness*. *December* 11. 1662, *Clappertoun contra L. Ednem*. (b) *March* 27. 1634, *Lady Dumfermling against the Earl*. (c) *Stair Institut. lib.* 2. *tit.* 5. §. 16. (d) *July* 23. 1625, *Minister of Kirkliston contra Whitelaw*. (e) *Penult June* 1622, *Bishop of Aberdeen contra his Tenents, and Drumlanrigs Son*. (f) *December* 17. 1628, *Chalmers contra L. Craigivar*. (g) *February* 28. 1628, *Maul contra Mathers*.

conform obtained againſt the Tenents, and Chamberlains of a Laick Granter of a Penſion, is effectual againſt ſubſequent Tenents and Chamberlains, without a new Decreet, or Transferrence: But not againſt the Tenents and Chamberlains of the Conſtituents Heir. (*a*) Yet an Eccleſiaſtical Penſion is valid againſt the Granters Succeſſor in Office, without neceſſity of a Decreet transferring. (*b*) The Lords found that a Penſioner needed not to cite his Author the Granter of the Penſion, to the obtaining of a Decreet conform thereon: But only his Tenents and Chamberlains, or other Intromettors with the Lands out of which it is crav'd. (*c*) Albeit no Action of Forthcoming is ſuſtained, unleſs the principal Debitor be called; nor any Action for Implement of an Obligation, without citing the Granter. Penſions granted by the Queen are not arreſtable in the Theſaurers hands: Becauſe they are Alimentary, and Her Majeſties Service might otherways be obſtructed. (*d*) The Lord *Dirletoun* ſtates it as a Doubt, if payment of Penſions granted by the King may be denied? and if not, what remedy is competent? To which the preſent Lord Advocat Anſwers, That the only Remedy in ſuch a caſe, is Moyen and Patience.

6. It is ſufficient to deliver a Penſion of Coals at the Coal-hill, and a penſion of Victu-

(a) *Stair Inſtitut. lib.* 2. *tit.* 5. §. 17. (b) *December* 7 1630, *E. of Carrick contra D. of Lenox. Stair ibid.* (c) *January* 20. 1627, *D. of Lenox contra Weems.* (d) *Stair ibid.*

tual

al upon the Ground where it grew, or at the Barn-door, without any neceſſity upon the Debitor of the Penſion, to carry the ſame to the Penſioners Dwelling-houſe: who muſt do that upon his own hazard and Charges. (*a*)

7. A Liferenter of Lands, or an Annualrent forth thereof dying after *Whitſunday*, and before *Martinmaſs*, doth tranſmit the half of that years Rent to his Executors; and the whole if he ſurvive *Martinmaſs*. But one who had a Liferent-Penſion out of Teinds dying in *June* after *Whitſunday*; it was found that his Executor had no Right to any ſhare of that years Penſion, & that the Teind could not in the leaſt be therewith affected: In regard the Penſioner liv'd not till after the Corns were ſhorn. (*b*)

(a) *March* 7. 1628. *Paip contra L. of Wolmet.* (b) *June* 24. 1630, *Scrimzeour contra L. Denmilu.*

SECT. IV.

How Rights are acquired from Beneficed Perſons by Poſſeſſion?

POſſeſſion is the detaining or keeping ſomething by our ſelves, or others, for our own uſe and behoof. Commonly diſtinguiſhed into Natural and Civil Poſſeſſion: Whereof the former is Real, and the latter preſum'd. Without nicely diving into the Nature of Poſſeſſion, to ſhew wherein it conſiſts,

ſiſts, HOW it is begun, continued, interrupted and loſt: I ſhall content my ſelf to enquire into the Point of Right ariſing from it, which is ſufficient for my purpoſe.

2. 'Tis the great priviledge of Poſſeſſion, that no perſon is to be turn'd out on't, but by Order of Law; or oblig'd to anſwer for Fruits *bona fide* conſumed. Poſſeſſion is not only an ordinary ground of Preſcription, whereby the property of the thing poſſeſs'd, or ſome other Right or Claim is acquired to one, and loſt to another: But alſo 'tis ſufficient to exclude ſuch as have no good Right; and is favourable *in dubio*. In a word, the Advantage by Poſſeſſion is ſo conſiderable, that Men call it (by way of Proverb) eleven Points of the Law, and better than an ill Charter. Seven Years lawful and uninterrupted Poſſeſſion affords the benefit of a Poſſeſſory Judgment. Which ſecures the Party from being diſpoſſeſs'd, till his Right be reduced.

3. Fourty Years Poſſeſſion induceth Preſcription, whereby the abſolute Right and Property of the thing poſſeſs'd is acquir'd and eſtabliſhed, without a Title in Moveables; (*a*) and with any colourable one in Heretage: Againſt Church-Men as well as others. Preſcription likewiſe cuts off all Objections againſt the Validity of long Tacks, and Liferent Rights. (*b*) Nay, the Negative Preſcription of Freedom is an effectual Security to the

(a) *December* 7: 1633: *Pariſhioners of Aberſcherder contra Pariſhioners of Gemrie.* (b) *Stair Inſtit: Lib:* 2: *Tit:* 12: § 21.

heretable

heretable poſſeſſor of Lands, againſt whatſoever Rights might affect the ſame, though conceived in favours of the poor: As a Mortification to a Hoſpital having Overſeers annually choſen; (a) or any other pious Uſe. Unleſs the Hoſpital be founded to Orphans and Minors; againſt which Preſcription doth not run. (b) This long Preſcription is reckoned *de die in diem, per tempus continuum;* without any Abatement or Conſideration of the time, when by Surceaſe of Juſtice there can be no Proceſs: (c) And there is little queſtion with us *de bona fide*, in a fourty Years Poſſeſſor. (d)

4. But our Law hath introduc'd ſeveral ſhort Preſcriptions calculated according to the Nature of the Right. Miniſters Stipends in particular preſcribe *quoad modum probandi*, if not purſued within five Years: So that after that time, they muſt be proven to be reſting unpayed by the Debitors Oath or by Writ. (e) The Lords found, that a Mortification becoming a part of a Stipend did thus preſcribe. (f) But the Act 1669. doth only concern the Preſcription of Miniſters Stipends: As being in effect Alimentary, and preſumed not to ly over long unpaid. And was not extended to Tiends due to Biſhops, or other Titulars. (g)

(a) *June* 30: 1671: *Beadmen of the Magdalen Chappel againſt Dryſdale.* (b) *December* 29. 1691: *Thomas Fiſher Theſaurer of Heriots Hoſpital againſt Hepburn of Beirford.* (c) *In the foreſaid Caſe of the Beadmen of Magdalen Chappel and Dryſdale.* (d) *Stair Inſtit: Lib:* 2: *Tit:* 12. § 11. (e) *Act:* 9: *Parl:* 2: *Seſſ:* 1: *Ch:* 2. (f) *Mackenzie Obſerv: on the ſaid Act* 9. (g) *March* 20: 1683: *Hamilton againſt Herries.*

CHAP.

CHAP. IX.

Of Rights to Benefices acquirable by Beneficiaries.

HAVING ſpoken to Rights acquirable by benefic'd perſons; it remains that I treat of Rights they may acquire. When the State of the Church became fix'd and fenc'd by Civil Laws, Lands and other Poſſeſsions were confer'd upon the Clergy; ſome by way of Feu, others by Mortification. Some Rights again they acquir'd by Tacks, and others by Poſſeſsion.

SECTION I.

Of Feus, Mortifications, and Tacks granted to Eccleſiaſticks.

SOME are of Opinion, that a Clergy-Man is incapable by his Character to be a Feu-Vaſſal. (*a*) But according to Law, he may purchaſe Feus as well as other Men. (*b*) The Point is more diſputable in the caſe of particular Monks, who acquire on-

(a) *Zaſius.* (b) *Craig, Lib: 1: Feud: Dieg: 14.*

ly

ly to their Monaſtry; and cannot ſerve as Vaſſals. The Doctors are not all of a Mind about the Queſtion, if a Monk may be a Feuer. The more general Opinion is, that he cannot ſucceed as Heir to an old Feu; but may acquire *Feudum Novum*. With us Monks were underſtood as civilly dead: And ſo neither capable to enjoy Feus by Succeſsion, nor Purchaſe. When they fell to Heirs, the Right of Succeſsion accreſc'd to the next Agnat; and new Feus diſponed to them return'd to the Diſponer. (*a*)

2. 'Tis the Conjecture of ſome, that Mortifications were ſo called, becauſe they are held as faſt by the Clergy, as what is put within the Gripes of dead Men. But others look upon that Term as improper, judging theſe pious Endowments ſhould rather go under the Name of *Vivifications*: Seing Church Men or Religious Incorporations are not conſidered to die; and therefore property acquir'd by them *Vivificatur, & nulli amplius mutationi ſubmittitur.* Mortifications pay no other *Reddendo* than *Preces & Lachrimas*, or the like. (*b*) And are not ſubject to Non-entry; (*c*) nor to any other Caſuality emerging from the Dearh of a Vaſſal. Church Men alſo enjoyed their Lands with ſome particular Priviledges and Exemptions; whereby Princes and Superiors found themſelves ſo nearly touch'd in the Matter of Intereſt, that according to the Laws of *France*, and *Spain*, and

(a) *Ibid: Lib:* 1: *Dieg:* 12. (b) *Stair Inſtit: Lib:* 2: *Tit:* 2: § 39. (c) *Ibid: Tit:* 4: § 20.

ſome

ſome other places, no Mortification is effectual, without conſent of the Prince. As to our Conſtitution, there is no doubt but Superiors will be ſhy to accept Reſignations from their Vaſſals upon Grants of Mortification, in favours of a Community, or for the uſe of the poor: As being in effect a giving up of their Caſualities. Nay, *Craig* is of Opinion, that, upon an Adjudication at the Inſtance of an Incorporation againſt their Debtors Lands, the Superior cannot be oblig'd to receive the Incorporation for a Years Rent. And my Lord *Stair* ſeems to be of the ſame Mind. (*a*) But withal propoſes a very proper Expedient for ſalving the Intereſt of all Parties, *viz.* That the Incorporation ſhould aſſign their Debt to ſome perſon in Truſt, to whom and his Heirs the Debtors Lands might be adjudg'd for the behoof of the Incorporation; and that the Seaſin ſhould expreſs the Truſt. By this means the Incorporations Debt would be made effectual; and the Superior might have his Caſualities upon the Death, Neglect, or Delinquency of the Truſtee. Albeit mortified Lands do not fall in Non-entry, and there is no neceſſity for renewing of the Infeftment: Yet the Right is never compleat, till Infeftment once be taken upon the Mortification. To which a poſterior Deed with the firſt Infeftment will be prefer'd. (*b*)

3. I don't obſerve much difference in Tacks granted to Benefic'd Perſons, from thoſe made

(a) *Inſtit: Lib: 2: Tit: 2: § 41.* (b) *February 1682: Laird of Findoun against the Town of Brechin.*

by

by them: Save that, 1. When the Granter is a Laick, they are not under such Restrictions, nor require such Formalities as the other. 2. A Laick having set two Tacks of Lands, the one to begin at the expiring of the other; the second Tacksman may remove the first when his Tack is run out, altho the Setter be dead before that time. But such a Tack set by an Ecclesiastick of his Benefice, would be null: Because the Entry is made to commence at a time when the Setters Right expir'd. (*a*)

(a) *June* 18: 1629: *Dumbar contra Turner.*

SECT. II.

How Ecclesiasticks acquire Rights to Benefices by Possession?

HAVING formerly in my curt way defin'd & divided common Possession, and glanc'd at the main Rights and Effects on't: That which here falls under Disquisition, is the peculiar Priviledge and Advantage that Church-men in particular have by it.

1. Possession to Churchmen is often *loco tituli*, and a sufficient Right: Because these being conversant mostly about Divine Matters, are supposed to be ignorant and careless of their Rights which go not to Heirs, but dye with themselves; besides that they may be daily lost between hands in the change of Intrants.

trants. So, in Poſſeſſory Judgements they need not found upon a Title, as Laicks are oblig'd to do; But are ſecure till Reduction by ſeven years poſſeſſion only. (*a*) And 13 years poſſeſſion is equivalent to a Title, according to the Rule of Chancery, *Decennalis & triennalis poſſeſſio habetur pro titulo*, even *in cauſa falſi*. Upon which account Prebendars were aſſoilzied from the Certification in an Improbation, for not production of their Proviſions. (*b*) But this thirteen years Poſſeſſion amounts to no more than a preſumptive Title, when Churchmen have no extant Right, and goes off by a clear contrary Probation. For if their Title can be found, the Poſſeſſion will be aſcrib'd to, and regulated by it. And tho it cannot be taken away by Certification for not production, or not abiding by; It may be excluded by a better Right, or improven by poſitive Probation; And any Exception or Nullity may be proponed againſt the ſame when produc'd. So, an Infeftment of Annualrent mortify'd by the King to the Chappel Royal, was found extinguiſhed by a voluntary Redemption thereof upon payment; Notwithſtanding of thirteen years poſſeſſion thereafter: In regard the Right mortified had a Reverſion in the boſom on't. (*c*) The Deſig-

(a) *November* 25. 1665. *Peter contra* Mitchelſon. *July* 18. 1671. *Earl of Hume contra L. of Kiſlaw. December* 6. 1672. *Veatch contra Weatherlie.* (b) *Hope Improbation, Biſhop of Galloway contra the Prebendaries of the Chappel-Royal.* (c) *July* 11. 1676. *Biſhop of Dumblane contra Kinloch.*

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nation of Temporal Lands for a Glibe, where there was Churchlands beside, was reduc'd upon the 161 *Act, Parl:* 13. *Ja:* 6; Albeit the Minister as Possessor *decennalis & triennalis*, had a presumptive Title: In regard the true Title by the Designation was produc'd. (*a*) A Right of Annuity granted to a Minister out of the Rents of a Colledge by two of seven Masters thereof, was found Null; Albeit the Receiver had been *decennalis & triennalis* Possessor: In respect it was not subscrib'd by the Majority of the Masters. (*b*) A Minister who had been thirteen years in possession of casting Peits, by a Right expresly precarious, was debar'd from that Priviledge at the Instance of the Heretor. (*c*) Another was not prefer'd upon the account of so many years possession of Vicarage Teinds to the Titular or Tacksman; where the Minister's Title being a Decreet of Locality, did not include the Tithes in Question. (*d*) But yet a Minister having been thirteen years in peaceable possession of a certain Stipend, was not restricted to less by the Decreet of Locality; unless it had been proven that he or his Predecessors had own'd the Decreet as the Title of their possession; (*e*) Albeit the Debate was with a singular Successor; who, seing a Decreet of Locality

(a) *February* 6. 1678. *Lord Forret contra Mathers.* (b) *February* 1684. *Barkley contra Provost and Masters of the Old Colledge of St. Andrews.* (c) *Mackenzie Observ: on the* 29 *Act* 11 *Parl: Ja:* 6. (d) *February* 24. 1681. *Lesley contra Minister of Glenmuck.* (e) *November* 28: 1676. *Semple against his Parishioners.*

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was in *bona fide*, one would think, to purchase without inquiring farther. It may be asked here, if absolute Rights granted to Churchmen can after thirteen years possession be qualified, or elided by extrinsick correlative Reversions, or Obligations? Sir *George Mackenzie* (*a*) doubts; but the Lord *Stair* (*b*) is clear they cannot.

2. There is another Rule of Chancellary, concerning the Effect of Triennial possession; And that is, *Triennalis pacificus possessor beneficii est inde securus.* Which is not so to be understood as if three years possession afforded the benefit of a Possessory Judgement. (*c*) The meaning being only this, That the Incumbent's Right to a Benefice after 3 years peaceable and uninterrupted possession, cannot be quarrelled during his Lifetime by any other Candidate or competing Churchman. (*d*) Nay, so favourable and effectual is possession to Churchmen, that an actual Minister serving the Cure at a Church, and which he had continued to do for eighteen years before, was prefer'd to another having a prior Gift of presentation to the same Benefice, and obtain'd Letters conform in his favours. (*e*) This Rule about the three years possession, is the thiry third of the *Roman* Chancellary; but the other concerning thirteen years possession, is not to be found there.

(a) *Ibid.* (b) *Instit: lib:* 2. *tit:* 8. §. 29. (c) *March* 12. 1629. *Marshal contra* L. *of Drumkilbo.* (d) *Stair Ibid. tit:* 1 §. 25. *tit:* 8. §. 29. (e) *July* 4. 1627. *Mackenzie Minister at Sclait contra his Parishioners.*

3. These

3. These Rules of Chancellary are the Form of Process observ'd in that Court at *Rome*; First invented by Pope *John* the 22*d*. There is a new Scheme of 'em made by every Pope at his Inauguration, to last during his time. Whence one compares them to the *Edicta prætorum*. They are of no Authority in *Scotland*, except in so far as they are adopted by our Custom: Such as these concerning the Triennial and thirteen years possession.

4. Three years possession doth also afford a priviledge to Patrons, That is, He who hath been in uninterrupted possession of presenting Ministers *trinâ vice*, or the three last times the Church did vake successively, in a competition with other Pretenders to the Patronage, hath the only Right of presentation *in possessorio pro ea vice*: But prejudice to the rest to declare their Right for the future, as accords. (*a*)

5. There is a priviledge of ten years possession introduc'd in favours of Ministers, by the 23 *Act*, 2 *Sess*: *Parl*: *W*. and *M*. which makes the Superiorities of patronate Benefices, that they were ten years in possession of, not to be redeemable by the Sovereign.

6. As temporary and qualified Rights are acquired by Three, or Seven, or Ten, or Thirteen years possession: So absolute and perpetual Rights are gain'd to the Church by the long Prescription of Fourty years. (*b*) Yea,

(a) *Mackenzie Observ: on the* 7. *Act*, *Parl*: 1. *Ja*: 6. (b) *Idem on the* 61. *Act*, 11. *Parl*: *Ja*: 6.

in

in regard the Popish Clergy at the Reformation turning desperate, did either send Abroad the Rights of their Benefices, or suppress and destroy them; Partly out of malice to the Orthodox Clergy, and partly to gratify interessed Laicks: It was declar'd by an Act of Sederunt 16. of *December* 1612, That ten years possession before the Reformation, or Thirty thereafter, should be a sufficient Right to Churchmen; Or to the King coming in their place by the general Act of Annexation 1587. So, Lands were infer'd to be Churchlands from Thirty years Possession by Churchmen of a certain Duty forth thereof: Altho another had been Immemorial possessor of that Land as Part and Pertinent of his own Barony; And instructed by a Reversion produc'd, that some one of his Predecessors had expresly Wadset the same. (*a*)

(*a*) *July* 1626. L. *of Kerse contra M. Andrew Reid.*

CHAP. X.

Beneficed Persons considered as Subjects; and what they are liable to in that Capacity.

THIS the duty of Subjects to contribute to the Support of the Government and Security of the Nation, by payment of Taxations and publick Burdens, Imposed for that end by King and Parliament, or a Convention of Estates.

2. In

2. In former times Church-men pretended Exemption from these, as not being liable to serve the publick with their Goods, but only with their Prayers and Tears. *Philip August* King of *France*, made once his Application to the Clergy of *Reims* for a Subsidy to pay his Troops. They stood upon their Priviledge and excus'd themselves from the Contribution: but assured the King they would Assist him *precibus et lachrimis*. That wise King, without shewing any Resentment prest the thing no farther. But soon after the Lands of the Chapter of *Reims*, being Invaded by Enemies, the Canons Implored the King's Protection, who made answer that he would also intercede for them with his prayers, as they had served him on a like occasion; Accordingly he wrote to the Enemy, praying them to spare the Patrimony of the Church. But they who were not accustomed to give way to the King's prayers, but only to the Force of his Arms, had no respect to the Letter. Then the Clergy of *Reims* being sensible of their Fault, promised (if the King would help them out of that Strait) not only to be assisting to him with their prayers, but also with their Money, when he should have to do therewith. The King immediately took Arms and Relieved the Church. (*a*)

2. Ecclesiasticks alledg'd for their Immunity from Taxes, 1. That our Saviour doth assert it. (*b*) 2. *Joseph* excepted the Priests

(a) *Thomassin part* 4: *lib.* 3. *chap.* 24: *N.* 3. (b) *Mat.* 17. 26.

Lands in *Egypt* from *Pharaohs* Ceſs. (*a*) But they were firſt brought over to a common Conformity by the ſpecious pretext of Holy Wars; and induced to lay out the Tenth of their Revenues to promote Expeditions to the Holy Land.

4. That which in the beginning was very extraordinary turn'd afterwards into a Cuſtom; and 'twas no wonder that Princes finding the beſt portions of their Dominions fallen into Church-mens hands, indeavoured to aſſert their Prerogative over theſe in Subjecting them to the like Services and Duties as their other Lands were liable to. The *decimæ papales & ſaladinæ* came to be frequently impoſed: and the Pope and King together often raiſed them. Sometimes the Pope, for his own private Ends, or to advance ſome Eccleſiaſtick intrigue required them, and if refuſed, the Nation was ſure to be interdicted; till which Interdiction was taken off, no Church Ordinance durſt be Adminiſtred. That Taxations and Impoſitions might be the more equally raiſed off the Clergy, the Pope in the Reign of King *James* the third, ſent Cardinal *Bagimont* to *Scotland* in quality of *Legat*, who called before him all the Beneficed perſons, to give up the Value of their Benefices upon Oath; and made a ſtanding Rental of 'em, called *Bagimonts Roll*: which became the Authentick and conſtant Rule for Taxing Eccleſiaſticks; and ſerved to direct

(*a*) *Geneſ.* 47. 26.

the

the Pope in Selling of Benefices to such as apply'd to him for that end. But afterward upon new Informations, the Court of *Rome* us'd to make higher Valuations; To prevent which, all Benefices were Ordained to be Taxed conform to *Bagimonts Roll*, and no higher. (*a*) *John* Duke of *Albany* obtained of the Pope, an Imposition laid upon the Prelats, according to the Value of their respective Benefices, for Salaries to the Senators of the Colledge of Justice. The Clergy refusing to acquiesce, appeal'd to *Rome*, and *Gawin Dumbar* Bishop of *Aberdeen* was appointed to prosecute the Appeal. But the Controversie dropt upon the Sessions being made to consist of 14 Ordinary Lords, half Spiritual, and half Temporal, and the President a Prelat, which distinction of Spiritual and Temporal Lords of Session was suppresst, and all Ordained to be Temporal by the 26 *Act* of the *Parliament* 1640.

5. But at length, because *in patrimonialibus* Clergy-men ought to be lookt upon as Laicks, they were not only made liable for Tenths upon extraordinary occasions; and first Fruits and Annats to the Pope; and the fifth Penny of their Benefices to the King: But also came to be Subjected to all emergent Impositions laid on *pro re nata* by Acts of Parliament, or Convention of Estates for the common Defence of the Countrey, or other publick Exigences. (*b*) Only

(*a*) *Act* 44. *Parl.* 6. *J.* 3. (*b*) *Act* 9. *Parl.* 2. *Ja.* 4. *Act* 277. *Parl.* 15. *Act* 2. *Parl.* 23. *Ja.* 6. *Act* 1. *Parl.* 1. *Ch.* 1. *Act of Convention* 4 *August* 1665.

the Chappel Royal by Act of privy Council in *January* 1584, and Miniſters Stipends by the 162 Act, 13 *Parl. J.* 6. were declared free of Taxation. But yet by the Acts of Convention 1665, and 1667, Parſonages and Vicarages belonging to Miniſters ſerving the Cure, were burdened with the publick Impoſitions, in ſo far as they exceeded the proportion appointed by Act of Parliament for a modified Stipend. And all Miniſters having Stipend or Benefices, and even unplanted pariſh Churches, were once made liable in Pole-Money. (*a*)

6. The old way of Levying Subſidies in *Scotland*, was by Taxation according to the Retour, and Taxt-Rolls : whereof the Clergy payed the half; as having beſides the *Tithes* the 4*th* part of the whole Land of the Nation in their poſſeſſion, and being only Liferenters, & not Proprietars of their Benefices. Church-lands erected into Temporal Lordſhips, were Taxed frequently as before the Erection. But the Retours of the weſtern Heretors being higher than in other Shires; and the Rents of Prelates and their Vaſſals much Impaired by Valuations of Teinds, and Miniſters Stipends : There was a new Valuation of this Kingdom made in the year 1660 ; wherein the whole Land-rent was given up as then poſſeſt, according to which Rental all Subſidies are now raiſed by way of Ceſs. Subſidies given in Parliament for a general and publick uſe cannot be other-

(*a*) *W. and M. Parl.* 1. *Seſſ.* 4. *Cap.* 9.

wiſe

wise applied. (*a*) But here it may be questioned if they be *debita fundi*, affecting singular Successors? The *Roman* Law allowed the Fisk *a tacite* hypotheck in Lands for Taxes, and Tribute-Money. (*b*) Which could not be evacuat or disappointed by any *Pa*ction betwixt private *Parties*. (*c*) With us all Subsidies laid on by the *Parliament*, are expresly declared in the particular Acts, imposing them to be real, and to affect the *Ground*; consequently singular Successors. But an imposition tho by Authority of *Parliament*, without such a Clause for poynding the Ground, doth not seem to be *debitum fundi*, but only to affect the Intromettors and persons having Right the time it was laid on. (*d*) Cess was ordained to bear Annualrent after six Moneths from its falling due. (*e*)

7. Bishopricks and Abbeys in *France* are liable to *le droit de Gîte*, a kind of free Quarters to the King, and Forreign Embassadors upon the Road. I have not observed any thing like this to have been in *Scotland* in time of *Popery*: save that the Monasteries were some times expresly obliged to lodge and Entertain the Bishops Officials, with four or five Horses, when they made their yearly Tour through the parish Churches.

(a) *Act* 9. *Parl.* 2. *Ja.* 4 *Mackenzie Observ. on the said Act.* (b) *L.* 1. *C. in quibus caus pign. vel hypothecæ tacit. contrah. l.* 1. *C: si propter public pensitat.* (c) L. 42. *ff, de pactis.* (d) *July* 13. 1664, *Grahame of Hilton contra the Heretors of Clackmannan, Stair Institut. lib:* 2. *Tit.* 6. §. 20. (e) *Act* 2. *Sess.* 2. *Parl:* 1. *Ja.* 7.

8. The Kings Trumpeters pretending to an Allowance of 100 *Merks* from every Biſhop as well as Temporal Lord, upon their obtaining the Dignity of Lords of Parliament; and the Biſhop of *Caithneſs* being Charg'd by general Letters to pay conform; he Suſpended upon this Reaſon, that albeit ſome of the Biſhops by way of Gratification might have given the Trumpeters what they thought fit at their Entry, it couldnot induce a Burden upon the Order, no ſuch thing being impos'd by Law or Cuſtom. And the Lords found the Biſhop liable, if the payment of 100 *Merks* was made by Biſhops at their Entry, as an ordinary uniform and conſtant fix'd Duty; but no otherwiſe. (*a*)

9. For the better proviſion of Univerſities, Fifty *Pound* was Ordained to be payed out of every 1000 *Merks* of Biſhops Rents, and 40 Lib. or Six *per cent* out of every Thouſand *Merks* of Miniſters Stipends yearly, for Five years commencing from the year 1664 *inclusive*. (*b*)

(a) *June* 8. 1681, *The King's Trumpeters contra the Biſhop of Caithneſs*. (b) *Ch.* 2. *Parl.* 1. *Seſſ.* 3. *Cap.* 24.

CHAP.

CHAP. XI.

Beneficed Persons considered as Superiors, and Vassels; and the Nature of Ecclesiastical Superiority explained. What hath been the Fate of it in Scotland, *and how Disposed of since the Reformation?*

THE Possessions of the Old *Romans* were allodial: But Superiority and Vassalage were Introduc'd by the Feudal Law. Such as had the *Plenum Dominium* granted Rights to others for performing some Service, or payment of some Duty. The Granter of these Rights we call the Superior, and the Receiver his Vassal. The Right transmitted by the Superior is term'd *Dominium utile*, and the Right Retain'd *Dominium directum*, for which the Superior should be Infeft in the Lands disponed. Except when the Queen is Superior, who is Infeft *jure coronæ* in all the Lands of *Scotland*.

2. There hath been Lands held of the Church, by all the different holdings of Ward, Feu, and Blench. Many forreign Princes held their Lands as Vassals of particular Churches. The Arch-bishop of *Trondeim* or *Drontheim*, formerly called *Tronden*, who is the Metropolitan of *Norway*, did once pretend that the Crown of *Norway* was held of his Church,

Church. And the Prince of *Antioch* did Homage to the Patriarch for his Principality. More as the half of the Rent of *Scotland* was poſſeſt as Benefices before the Reformation: and a conſiderable part of that conſiſted of Superiorities.

3. By the 29 *Act. Parl.* 11. *Ja.* 6. where Lands and Teinds are ſet in Feu together for a joynt-duty, the King is Superior of the whole Tenendry, Stock and Teind; But has only Nine parts of the Common Duty, and the Church the Tenth. The Superiorities alſo of all Lands and others Diſponed or ſet in Tack, and of Burrows of Regality and Barony, Heretable Bailliaries, and Stewartries, formerly held of the Church, are declared to belong to the King; and the Vaſſals Heirs to be Enter'd by *Brieves* out of the Chancellary; without neceſſity upon the Vaſſals to renew their Rights from his Majeſty. Neither can his Majeſty quarrel the ſame, being Confirm'd by him or his Predeceſſors, for bygone contravention of any Clauſe or Condition in their Infeftments; nor for Diminution of the Rental, if it be not of the old Penny-mail *de liquido in liquidum*; nor for converſion of Victual into Silver-duty, or any other cauſe, except for Falſehood, or for not payment, and performance in timecoming, of the Duties and Services contained in their Infeftments. This was carefully provided, for the Security of Vaſſals and Feuars of Church-lands, againſt the King who is declar'd their Superior, and was a powerful party. When the Act

cautions

cautions that the King ſhall not quarrel the Vaſſals Rights, ſave only for a Diminution of the old Penny-mail *de liquido in liquidum*, that is, Feus being granted about the time of the Reformation for high, and renewed again for leſs Feu-duties; the Feu ſhould not be queſtioned, if it was not below the old Rental, Tho the Feu-duty were leſs than was once payed. The Lands and Lordſhip of *Torphichen*, are expreſly excepted from the general Annexation 1587; and yet is a Queſtion preſently *ſub judice*, if Temple-Lands be Church-Lands? (*a*) The Lord *Thirleſtane*, whoſe Succeſſor is now Earl of *Lauderdale*, having got the Lordſhip of *Muſſleburgh* erected in his Favours, by King *James* the ſixth, and excepted from the general Annexation 1587; The Lands of Eaſter and Weſter *Hails* being a part of that Lordſhip, were found to hold of the Earl, notwithſtanding that the general Surrender was Subſcribed by one of his Predeceſſors; and the Act of Annexation 1633, doth annex Church-lands without exception of *Muſſle-Burgh*. (*b*) In regard the ſaid Act reſpects only theſe annexed by the general Act 1587: *Muſſleburgh*, that was before ſpecially excepted, not being expreſly included therein. *Nam poſteriores leges ad priores pertinent, niſi contrariæ ſint.* L. 28. *ff. de legibus.*

4. Upon the Submiſſion by the Lords of

(a) *In the caſe betwixt the Laird of Auchloſſin, and ſome Vaſſals in Temple-lands.* (b) 14 *February* 1705, *Maitland againſt Brand.*

Erection,

Erection, and other Titulars in *February* 1628, by the 14 *Act*, 1 *Parl. Ch.* 1. The Superiorities of all Eccleſiaſtical Benefices, with the Caſualities thereof, not diſponed before the Commiſſion of Surrender dated 17 *January* 1627, and in time coming are declared to pertain to the King reſerving to the Lords, and Titulars of Erection who ſubſcribed the Surrender, the Feu-duties till redeem'd by His Majeſty at Ten years Purchaſe, and upon payment to them of 1000 *Merks* for each Chalder, or 100 *Merks* of Feu-duty, or Hundreth *Merks* worth of all other conſtant Rent of the ſaid Superiorities; not being naked Service of Vaſſals. Whereas Feu-duties in common Commerce give a higher price than Land. His Majeſty was not only made Superior to the Erection Lords, but even to all the Vaſſals of the erected Benefices, who were allowed to hold of the King if they pleas'd. And by an Act of Exchequer, (*a*) all was to be reckon'd Superiority, whereof the Titulars of Erection, had not the property in their perſon before the Erection, nor acquired the ſame thereafter with poſſeſſion preceeding the general Surrender.

5. Tho the Feu-duties be expreſly reſerved to ſuch as ſubſcribed the Surrender, yet in reſpect that cannot be known or made appear after ſo long a time, the Titulars Acknowledgement of the Kings Right, either expreſ-

(a) *February* 1. 1634.

ly

ly or by Deeds of Homologation; is equivalent as if he had subscribed. (a)

6. Because in the Submission, and the said 14*th* Act, the Feu Mails and Farms are only reserv'd to the Lords of Erection during the not Redemption; Some doubt (b) if under that Reservation, the Casualities of Superiority, particularly Escheat and Non-entry be comprehended; Since *inclusio unius* would seem to be *exclusio alterius*. Yet the Lords of Session found Surrenderers to have Right to the Casualities of Superiority, till they were redeem'd by the King. (c) And the 30 *Act*, 1 *Parl*: *Ch*: 2. ordains the Vassals to make payment of the Feu-Farms and Duties contain'd in their Infeftments, to the Lords of Erection; So long as the prices modify'd by the Commission, according to the Act of Parliament 1633 are unpay'd. However, they were found not to have Right to Arage and Carriage; (d) That being naked service of Vassals: Nor can they pursue Reduction of those Feus without concourse of the King's Advocat, having his Majesties special Warrand for that Effect. (e) But they may pursue Exhibitions against the Vassals for clearing what Feu Duties they pay. To whom no abatement was allowed of their Feu Duty, upon account that the Lands by

(a) 27. *June* 1662. *Watson contra Ellies*. *Stair Instit*: *lib*: 2. *tit*: 4. §. 11. (b) *Mackenzie Observ*: *on the* 14. *Act*, 1. *Parl*: *ch*: 1. (c) *July* 24. 1632. *Rule contra L. Billie*. (d) *In the foresaid Case of Watson against L. Billie*. (e) *Mackenzie Ibid*: *June* 24. 1664. *L. Prestoun contra Nathaniel Ebred*:

Calamity

Calamity of War were render'd desolate, and laid waste for some years: In respect the Feu Duty was small; and they might have gain'd as much in other years, as was lost during the Devastation. (a)

7. The Lords of Erection by the said 14th. Act, are expressly intituled to the Few Duties of their Vassals, till redeem'd by the King: But it is not so clear, that they can also retain till Redemption, the Few Duties of Lands and others belonging to them in property before the Surrender. It may indeed be pled for it, That the Submission to which the Act of Parliament relates, expressly declares, That the Lords of Erection their proper Lands and others, are not comprehended under the Surrender, but to be holden of his Majesty as before the Erections: And it were strange that they should be oblidg'd to pass from the Feu-Duties of their own Property without Satisfaction; and not from these of their Vassals Lands, in which they had far less Interest. 2. The Reservation in the former part of the Act, is understood to be repeated in the latter, with the same Quality, since nothing contrary is expreſt: And many of the Lords of Erection were never put to answer for the Feu-Duties of their proper Lands. For these Reasons they were eas'd as to Bygones before the King was called in Question; But made lyable thereafter, as Sir *George Mackenzie* observes. (b) Who argues why it should be so, to this purpose.

(a) *In the said Case of Watson and Ellies.* (b) *Ibid.*

1. The

1. The Act of Parliament having expreſly reſerv'd the Feu Duties of Vaſſals to their Superiors by Erection, till they got Satisfaction for the ſame from his Majeſty, and not renewed the Reſervation in the immediately ſubſequent caſe of their proper Lands; It is an Argument, That the Parliament deſign'd the King ſhould pay nothing for Feu Duties of the Property. Since Acts of Parliament are not to be extended *de caſu in caſum*, eſpecially in ſuch an unfavourable caſe as this, tending to deprive the King of a part of what he gave freely. Farther, There was this Reaſon of the Diſtinction betwixt Feu Duties of the Superiors proper Lands, and thoſe of their Vaſſals: They had no Intereſt in the Vaſſals Lands but the Feu Duties, and therefore were ordain'd to get a kind of eaſie Satisfaction for theſe. But the Property being ſecur'd to them by the King's paſsing from his Reduction, it was highly reaſonable in Contemplation of ſuch a favour, he got the Feu Duties without any acknowledgement. 2. By Charters under the Great Seal granted to the Lords of Erection ſince the Surrender, and the Act of Parliament, they are lyable to the double *Reddendo* of a Blench Duty for their Intereſt in the Tithes and the Vaſſals Lands; And a few Duty for their own Property. 3. The pretence of not being formerly in uſe to pay Feu Duties for their proper Lands, is not Relevant; Becauſe the King cannot be prejudg'd by the negligence of his Officers; Nor is it univerſally true, for the Earls of *Roxburgh* and others did pay.

8. It

8. It were no doubt the Intereſt of the Vaſſals, that the reſerv'd Feuduties were redeem'd, and her Majeſtie might likewiſe find her Account in it, by getting a vaſt and ſure Revenue: But I never to this day heard more of any ſuch Redemption, than what is inſinuated by Sir *George Mackenzie*, in the end of the Supplement to his Learned Obſervations upon the Acts of Parliament. Where he informs, that ſome procur'd from the King Rights to the Feuduties, after he had redeem'd them from Titulars of Erection, or obtain'd from his Majeſty Right to redeem the ſame: And ſo in Effect interpos'd themſelves betwixt the King and his Vaſſals of Kirklands.

9. In the general Act of Annexation 1587, prior Diſpoſitions of Churchlands are excepted, but the Superiorities of all Churchlands declared by the *14th* Act of the Parliament 1633 to belong to the King, were by the *10th* Act of that ſame Parliament annex'd to the Crown. By which all prior Rights and Deeds any ways prejudicial to his Majeſtie, as to the Superiorities & Few-farms of Church-lands, are declar'd null. To elude that Act, Commiſsions were obtain'd from the King for exerciſing Acts of Superiority in theſe Lands, by ſerving of Heirs, and receiving Reſignations, *&c.* with power to apply the Compoſitions and Caſualities to their own uſe; Whereof ſome procur'd long Tacks for inconſiderable Tack-duties. The Earl of *Dumfermling* having procur'd a long Tack of the Caſualities of the Superiority of the Abbacy of *Dumfermling*, containing a Mandat to enter the Vaſſals:

The Exchequer refus'd it, notwithstanding of a Ratification thereof in Parliament, and a Letter from King Charles the Second, declaring that it fell not under his Revocation. (*a*) For by the 53 *Act*, 1 *Parl*: *Ch*: 2. all Grants of the Superiorities of Churchlands, with all Warrands, Tacks, Commissions, Bailliaries, or Deputations for entring of Vassals thereto, since the Surrender were declared null. But some Lords of Erection got Bonds from their Vassals in Churchlands, to continue their Vassals and not to hold of the King, notwithstanding of the Act 1633, declaring him Superior of all Church-lands. To secure which Lords of Erection, it was provided, That any new Right of Superiority of Churchlands obtain'd with consent of the Vassals, should stand good as to the Consenters. In regard that such a consent is of the nature of a Resignation of the Property, in favours of the Superior, to be holden of the King. But prejudice to his Majesties Right of Reversion of the Feu-duties and Casualities, conform to the Act 1633. The Lords of Session did not think the single taking of Infeftment from a Titular of Erection, did infer such a consent, as the Consenter could not return afterwards to be the King's Vassal: But they found that it might be infer'd from Presumptions, shewing that the Vassal design'd to oblige himself to hold of the Lord of Erection, and not of the King. (*b*) Yet in Sir *George Mackenzie's*

(a) *Mackenzie Supplement to his Observ: on the Acts of Parl.* (b) *July* 28. 1669. *Duke of Hamilton contra Weir of Blackwood.*

Opinion,

Opinion, (a) this Clause in the Act of Parliament, can only be understood of a clear and expres consent to hold only of the Lords of Erection, and not of the King. Without which, the benefit to hold of the King so clearly introduc'd by the Act 1633, in favours of Vassals of erected Church-lands, can hardly be taken from them.

10. By the 17. *Act*, 18. *Parl. Ja.* 6. Bishops were restor'd to their Estate and Dignity, but not expresly to their Superiorities: Tho some think that was tacitely done by the 14. *Act*, 1. *Parl. Ch.* 1. in declaring that the King's being Superior to Erection-vassals, should be no incroachment upon the Rights of Superiority, competent to Bishops and their Chapters. But now Prelacy, and all Superiority of Office in the Church, above that of Presbyter, being abolished, (b) as a Grievance to this Nation, and contrary to the Inclination of the Generality of the People, who were Reform'd from Popery by Presbyters: The Superiorities formerly pertaining to the saids Prelates, or their Chapters, or Depending Offices, were declar'd to belong to the King, without any Interposition of another Superior, albeit the Vassal should consent. (c) So, that if a Bishoprick were now erected in a Temporal Lordship, in favours of any particular person: One would think that person should not be Superior to the Vassals. Tho

(a) *Observ: on* 53. *Act.* 1. *Parl: Ch:* 2. (b) *Act* 3. *Sess:* 1. *Parl: W. and M.* (c) *Act* 29. *Sess:* 2. *Parl: W. and M.*

in

in the Caſe of Forfeitures, while they remain in the Queens hand, Her Majeſty is Superior to the forfeit perſons Vaſſals: And theſe, after the Forfeiture is gifted, turn Vaſſals to the Donatar. In regard many of the Biſhops Vaſſals had ſuch ſmall portions of Land, that they were not able to go to the charges of expeding their Infeftments; The Signatures and Charters of ſuch of them as are valued but at an hundred pound or under, are ordain'd to paſs the Great Seal, *per ſaltum gratis*: And the ſpecial Services and Precepts for infefting their Heirs to be expede in the Chancellary for ten Merks. (*a*) If the valuation be two hundred pound, or under, and above one hundred pound, no more can be exacted for paſſing of Signatures and Charters through the Regiſters and Seals, than fifteen pound, in ſatisfaction of all Dues and Fees whatſoever. Nor are they bound to pay a Seaſin Ox to the Sheriff, or any Dues for Æques exceeding the twenty part of their Few-duty. (*b*)

11. The Superiorities of Benefices under Patronage are now redeemable by the Queen, as the Superiorities of other Church Lands were by the Act 1633. Except, 1. Where the Feu Farms are a part of the Miniſters Stipend, or where he hath been in poſſeſſion thereof for Ten Years. 2. Excepting the Superiorities of the Provoſtries of *Hamiltoun* and *Bothwel*. (*c*)

(a) *Act* 32. *Ibid: junct: Act* 11. *Seſſ:* 7. *Ibid.* (b) *By the ſaid Acts* 32. *&* 11. (c) *Act* 23. *Seſſ:* 2. *junct: Act* 36. *Seſſ:* 4. *Parl: W. and M.*

12. Provoſtries and Prebendaries of Collegiate Churches, Altarages, and Chaplainries were not underſtood to fall under the general Annexation 1587. So, in a Competition betwixt Mr. *John Mackgil* Arch-prieſt of *Dumbar* and the Kings Collector, (*a*) for the Superiority of ſome Lands holden of the Arch-prieſt before the Annexation; The Lords of Seſſion prefer'd the Arch-prieſt. Patrons of ſuch Benefices did, in obedience to Acts of Parliament, (*b*) provide Burſars to them. Who thereby had Right to the whole Rents and Caſualities, whether conſiſting in Property or Superiority, conform to the ancient Foundations, notwithſtanding any Application in time of Popery, or Diſpoſition by the King. But in regard theſe Titulars cannot be infeft, nor the Vaſſals of their Benefices know them from any Regiſter; whereby the Vaſſals were put to a great uncertainty about their Superiors, till their Entry upon Retours and Precepts of *Clare Conſtat*, or Reſignation and ſingular Titles by the Laick Patron holding immediatly of the King, (whoſe Infeftment ſtands upon Record) was declared as valid, as if they had been enter'd by the Titular: Without neceſsity of any conſent from the Titular, or others. (*c*) By which Act, Magiſtrats of Royal Burghs, that were formerly Patrons to Foundations of the foreſaid Nature within their Bounds, are alſo declared Superiors to

(a) *March* 4: 1593. (b) *Act* 12: *Parl:* 1: *Act* 158: *Parl:* 12: *J: 6.* (c) *Act* 54: *Parl:* 1: *Ch:* 2.

the

he abovementioned effect of Entering Vassals. Yet the Laick Patron, as presumptive Superior, cannot pursue Reductions, nor claim the Liferent Escheat, or any other profits of the Superiority: All which fall and belong to the Titular the true Superior; unless the Vassal cannot shew who is the true Superior. (*a*) The foresaid Act of Parliament is only special as to the Case of Patronages holden of the King by Infeftment. And therefore some Lands being mortified to maintain a Chaplain at S. *Mary*'s Altar in the Church of *Dumfermling*, with this Provision, that the Founder and his Heirs Male should present the Chaplain; and the Lands being afterwards Feued, and of new again Disponed: It was the Opinion of my Lord *Dirletoun*, (*b*) that the Purchaser behov'd to be enter'd by the Chaplain as Superior; and if there was none, a Chaplain should be presented. Since the said Patronage was not by Infeftment, but Provision, and so came not under the Act. Nor yet is the Act, in the Opinion of that great Lawyer, to be understood of Ecclesiastick Patrons; the same being made while Bishops were suppreſt: And therefore he thinks, that a Bishop, who is Patron to a Chaplainry, would not be Superior to the Chaplains Vassals. (*c*) But one of the greatest Lawyers of this Age (*d*) brings Ecclesiastick, as well as Laick Patronages, within the Verge of the Statute.

(*a*) *Mackenzie Observ: on the said Act* 54. (*b*) *Doubts, Title Altarage.* (*c*) *Ibid.* (*d*) *Sr. J. Stuart, Notes upon Dirletouns Doubts.*

13. The Grants of Lands to Church Men, were only Verbal in presence of Honourable Witnesses, till the Reigns of *Alexander*, and *David*, when Donations by Charter came to be common.

14. It is the common Priviledge of a Superior, that he can oblige his Vasal to produce his Rights, either by way of Improbation, or in an Exhibition: And the King, as presum'd to be Universal Superior of all Lands, may, by a Proclamation, or Improbation, or Act of Parliament, ordain all Evidents to be produc'd; But they can only be declar'd null in an Improbation or by a Statute. (*a*) In a Reduction and Improbation at the Instance of the Kings Donatar, as come in place of the Bishops, against their Vasals: It was found, That Minors could not be oblig'd to produce any Writs, except those specially called for; and that no Certification could pass against them, upon the general Clause in the Lybel. (*b*) But they were put to take a day to produce, the Pursuer condescending upon the particular Lands as commonly known and design'd, and upon the Rights thereof crav'd to be reduc'd, and upon the Granters and Receivers; altho he should not be special, as to the Dates of the Writs. (*c*) In a Reduction and Improbation depending before the Session, at the Instance of *Ross* of *Auchlossin* against some Heretors of Temple Lands: This De-

(a) *Mackenzie Observ: on the* 245: *Act*, 15: *Parl: J*: 6.
(b) *January* 20: 1698: *Douglass against the Bishops Vassal.*
(c) *February* 1: 1698: *Inter eosdem.*

fence

fence is proponed, but not yet Adviſed, That Temple Lands were Church Lands, and came within the Verge of the general Annexation 1587. So that the Purſuer could have no Intereſt to call for Production of the Rights of theſe.

15. Albeit Eccleſiaſticks have abſolute Right to the Rents of their Benefices during their Incumbency, and as Tutors can do all juſt and neceſſary Acts of Adminiſtration, ſuch as the entring of Vaſſals and other Deeds allowed by Law: They cannot put their Benefices in a worſe caſe than they found them in at their Entry, by changing the Vaſſals Holding, or otherwiſe. But all the Kings Vaſſals, whether Prelates or Barons, were allowed, for the better Improvement of their Ward Lands when they were barren, to ſubſet the ſame in Feu to a competent Avail, that is, for the Retoured Duty; ſo as the Sub-Vaſſal, upon falling of the Ward, ſhould only be lyable to the King for his Feu Duty. (*a*) This Privilege of Feuing out Ward Lands was again indulg'd to Biſhops. (*b*) But theſe Statutes were only Temporary: For Biſhops under the laſt Eſtabliſhment could not Feu their Ward Lands. (*c*) And yet it would ſeem, that Feuing doth afford a more conſtant Rent to the Church, than the Caſuality of Ward that ſeldom falleth; and when it doth fall, is gifted and diſpon'd by the Titulars for the time to

(a) *Act* 71: *Parl*: 14: J: 2: *Act* 91: *Parl*: 6: *J*: 4. (b) *Act* 9: *Parl*: 23: J. 6. (c) *Mackenzie Obſerv*: *on the ſaid Act* 9.

their own private use, without any benefit to their Successors: Whereas, by a competent yearly Feu Duty, the State of the Benefice is augmented and bettered; and there is less occasion for applying Church Rents to particular Uses. As the foresaid Acts were only calculated to a certain time, and not to be perpetually binding: So they were no Warrand to Bishops to Tax their Ward Lands for a certain Duty; that being contrary to the Interest of the Church, and also of the King, who would thereby be debarr'd from his Right to the Ward and Marriage *sede vacante*. And therefore the Constitution of the Taxt Ward of the Lands of *Blebo* by the Arch-Bishop of S. *Andrews*, was reduc'd at the Instance of his Successor. (*a*) Albeit the Bishop might have granted effectually Gifts of Ward, Non-entry, and Liferent Escheat falling to him during his Incumbency, even for Years after his Death, or Removal; and also Gifts of Commissariot, or Bailliary, to continue during the Receivers Lifetime: And it would seem, that Taxt Ward is a more fix'd Rent than the Casuality of Common and Black Ward. But if beneficed persons were allowed to Tax their Casualities of Ward and Marriage, by the same Reason, they might dispose upon their Casualities before they fall, and Tax the other ordinary Casualities of Non-entry, Recognition, Escheat, *&c.* and so quite dilapidate the Benefices. Nor was the succeeding Bishops Accep-

(a) *March* 12: 1684.

tance

tance of payment of the Taxt Duty ſuſtain'd as an Homologation to hinder him to reduce the Charter. In regard he could claim no more, till that was was taken out of the way by a Reduction. (*b*)

16. The Superior, by his *Dominium Directum*, has not only a Title to Homage, and ſome Servile Performances from his Vaſsal: But alſo to the payment of the Duty contained in the *Reddendo* of the Vaſsals Charter, and to ſome Caſualities. The ordinary *Reddendo* in Infeftments of Erection is a Blench-duty, and beſides to pay to the Miniſter the Stipend therein mentioned; Of which the Heretor who buys his Tithes by vertue of the King's Decreet Arbitral, was bound to relieve the Titular of Erection. *Preces & Lachrimæ* are all the *Reddendo* for mortify'd Lands, which are holden *in puram Eleemoſynam.* Superiors have different Caſualities according to the different Holdings: But ſome are common to all Holdings; As Non-entry, Relief, and Life-rent-Eſcheat. Mortifications are not ſubject to Non-entry, and require no Renovation of the Infeftment. Relief is an acknowledgement pay'd by the Vaſsal at his Entry, for relieving his Lands out of the Superiors hands. The Entry of Heirs in Lands holden of Churchmen muſt be expede in the ordinary manner, either by Service and Retour, or by Precepts of *Clare Conſtat*: Except the Vaſsals of Church Lands in *Orkney* and *Zetland*, not

(a) *Inter eoſdem.*

exceed;

exceeding 20. Pound of Valuation, who bruik by the Udal Right without Renovation of their Infeftments. (*a*) Which Udal Right requires no Title in Writ for the Enjoyment of Lands and Heretages, but only to be able to inſtruct Poſſeſſion as Heretors by Witneſſes. (*b*) But yet an Infeftment to a perſon as Heir to her Father by vertue of a Charter upon her own Reſignation was ſuſtained, and the Charter found equivalent to a Precept of *Clare Conſtat.* (*c*)

17. By the 32. *Act*, *Parl.* 4. *J.* 5. the Liferent Eſcheat of Vaſſals, that have continued Year and Day at the Horn, belong to their immediate Superiors; except in caſe of Treaſon and Leſe Majeſty, when it falls to the King. Which was extended againſt beneficed perſons, by the 49. *Act*, 3. *Parl. J.* 6. Yet the Statute doth not clear, whether the Caſuality of their Liferent ſhould fall as vacant Stipends to the Patron, or others having Right to them; or to the King. But Miniſters Eſcheat, both Single and Liferent, belong to her Majeſty: (*d*) Who will have Right to the Stipend, altho paid out of the Tithes of Lands holden of another Superior. (*e*) A Tack of Tiends for many Nineteen Years, exceeding the longeſt Life of any Man, will fall under the Liferent Eſcheat, altho there be no formal Conſtitution

(a) *W. & M. Parl. Seſſ.* 2. C. 32. (b) *Stair Inſtit. Lib.* 2. *Tit.* 2. § 11. (c) *January* 20. 1666. *Lord Rentoun contra Feuers of Coldinghame.* (d) *Stair Inſtit. Lib.* 2. *Tit.* 2. § 40. *March* 28. 1628. *Fletcher contra Irvin.* (e) *Ibid.*

or

of a Liferent.(*a*)But where any Tack of Lands or Tithes contain ſeveral Liferents, the Rebels own Liferent only, falls within the compaſs of his Eſcheat. (*b*)

18. The Manſes and Glebes of Miniſters are more Allodial, than Feudal; having no expreſs Holding or *Reddendo.* And by the 30. Act of the Parliament 1641, the Commiſſion was impower'd to aſſign the Feu Duties of Parſons and Vicars Glebes to the Miniſter ſerving the Cure. But tho Manſes and Glebes cannot continue under any private Holding, being given to Miniſters by Acts of Parliament; we conſider them as holden of the King in Mortification. (*c*)

19. Sometimes the Property and Superiority of Lands are both Heretable, and come to be Conſolidate and Confounded in one perſon. When the Property accreſceth to the Superior, there's ordinarily no neceſſity of a new Infeftment: For the Seaſin of the Superiority carries the Property, if there be no other Proprietar. But it is not ſo in Eccleſiaſtick Benefices, which are only conferr'd on perſons for their Lifetime, whoſe Liferent Rights and Proviſions doth entitle them to the Rents and Caſualities no longer than they live. And therefore an Heretor of Lands holding of a Prebend of the Priory of *Crail,* coming there-

(a) *S: J: Stuarts Notes upon Dirletouns Doubts, Title Tacks of Tiends.* (b) *Act* 15: *Parl:* 22: *J:* 6. (c) *March* 28: 1628: *Fletcher contra Irvin: Stair Ibid.*

after

after to be Prebend, gave in a Petition to the Lords of Session, craving a Warrand to the Director of the Chancellary, to give out Precept and Charges to the Sheriff of the Shire to infeft him in these Lands : Which was granted, seing it could prejudge no body. (a)

(a) *June* 21: 1634.

The End of the First Part.

A TREATISE OF *Church-Lands, and Tithes.*

PART II.

CHAP. I.

Concerning Churches, and Church-Yards.

GOD the Sovereign LORD and Author of all we poſſeſs and enjoy, doth challenge ſome part of our Lands for Churches, and Habitations to his Miniſters: And for their Subſiſtence a Competency of our Rents, or Incomes; commonly thought to be the *Tithes.* But many Princes, and great Perſonages, not content that the Church ſhould have theſe

these only, did out of a Principle of pious Zeal, richly indow Her with Lands and other Possessions also. From hence came our distinction of the Temporality and Spirituality of Benefices. Having hitherto treated of the former; we shall now handle the Spirituality, comprehending *Churches*, and *Church-Yards*, *Manses*, *Glebes*, and *Tithes*; Of which I am to Discourse in order as they ly.

1. Churches are publick Houses erected for Divine Worship and Service, and for preaching the Word of GOD. Some thinking it a mean and derogatory thing to confine or circumscribe the Worship of GOD within Walls made with Hands, they would have no Churches among them, but perform'd the Sacred Rites in the open Air: As if the World it self only, were a sufficient Temple for the Author of Nature. But the Generality of Man-kind have gone into the Practice of setting Churches apart for Divine Service. About the Origine whereof there is much difference of Opinion among the Learned; which I shall not take pains to decide. Pagans as well as Jews had their Temples, whereof some for the Curiosity and Magnificence of Fabrick, were esteem'd the Worlds Wonder. The Primitive Christians during the first three Centuries, while they wanted the Countenance of Secular Powers, were forc'd to take up with Church-Yards, in stead of Churches; and to serve the Living GOD among the Dead. They got afterwards into Churches, but were turn'd out of 'em by the fury of *Dio-*

clesian

cleſian's Perſecution; and Reſtor'd by *Conſtantine* the Great. In whoſe time not only were the Heathen Temples converted into Chriſtian Churches: But alſo many new and Magnificent ones erected, for the Uſe of ſuch as profeſs'd the Chriſtian Religion. *Conſtantine* and other Princes had Portable Churches which they carried about, and made uſe of in their Travels and Warlike Expeditions. (*a*) The Fancy of building fine Churches, was as much humoured in *Scotland* as any where, and as early too. (*Vid. Part* 1. *Chap.* 5. *N.* 8. *& ſeqq.*)

2. An antient way of founding Churches, was this; The founders made their Application to the Biſhop of the Dioceſe, who came to the place where the Altar was to be ſet, and ſaid a Prayer; Then took up one of the Stones, which, having cut a Croſs upon it, he laid with his own Hands upon the Ground-Work. That being done, the Work-men receiving a Signal, proceeded to build. As the Building was got finiſhed, and the Church indowed, and not till then, it behoov'd to be Conſecrated by the *Biſhop*: Yea, in ſome caſes Re-conſecration was us'd: *viz.* if the Church happen'd to be burnt down; or polluted by Murder, Fornication, or Adultery therein committed. The *Romaniſts* do at this day ſuperſtitiouſly conſecrate their Churches, and Church-utenſils, by various Rites and Ceremonies, by Holy Water, Unctions, and

(a) *Bruneman: de jure Eccleſiaſtico lib:* 2. *cap:* 2. *N.* 4.

ſprinkling

ſprinkling of Aſhes, and Exorciſms; But there are no ſuch Conſecrations with us.

3. Having treated in another place (*Vid. Part* 1. *Chap.* 5. *N.* 8. *& ſeqq. junct. Chap.* 3. *N.* 9. 18. *& ſeqq.*) of the ſeveral kinds of Churches; all I ſhall do here, is only to obſerve, that the Pope behov'd to authorize the Erection of a Cathedral-church. (*a*) And in order thereto, us'd to appoint certain perſons to inquire if the thing might be done, without incroaching upon anothers Right, and if it tended to promote Divine Worſhip. So, upon the Application of *Bricius* Biſhop of *Murray* to Pope *Innocent* for the Erection of the Trinity-church of *Spyny* into a Cathedral for himſelf, and his Succeſſors in that See; Commiſſion was given to the Biſhops of St. *Andrews* and *Brechin*, and the Abbot of *Lindors*, to make Trial if the Glory of GOD might be advanc'd, and no body prejudg'd by ſuch an Erection: And upon their Report the Papal Authority was interpos'd to Legitimate the ſame. (*b*) The Biſhops conſent was ſought to the founding of other publick Churches. (*c*) Collegiat-Churches were ordinarly erected out of ſeveral Pariſh-Churches united for that Effect: And where theſe belong'd to different Patrons, all their conſents behov'd to be obtain'd. So, the Lord *Chrichtoun* Patron of the Church of *Chrichtoun*, being deſireous to found a Collegiate-

(a) *Bengæus de beneficiis ad verba cum ſuo Reditu, Cap.* 2. *Part* 1. §. 2. *N.* 2. (b) *Chartul. Moravienſ.* (c) *C. ultimo* 9. *de conſecrat. diſtinct.* 1.

Church,

Church, consisting of a Provost, nine Prebendaries, and two Clerks out of the Rents of *Chrichtoun* and *Lochquharret*, a Mensal-church belonging to the Arch-bishop of St. *Andrews*: The Bishop's consent was procur'd, with a Reservation to himself of the Patronage of the Prebendaries and Clerks that had their Patrimony out of the Rents of the Church of *Lochquharret*. It was Lawful to any Body to have an Oratory in his House, or upon his Ground, for the Use of his Family; Providing Mass was not therein celebrated. (*a*) For to the Celebration of Mass the Bishops leave was required; And seldom refus'd if there was just Cause for it, as the Remoteness of the Parish-church. (*b*)

4. Such was the Favour shown to Churches, that if any person began to build one, he, or his Heirs, might have been compell'd to finish it. (*c*) Great Reverence hath also been given to Churches. The *Ethiopick* Christians held it unlawful to enter a Church with covered Feet. Churches by the Canon-Law were Sanctuaries; but have not had that Priviledge in *Scotland* since the abolishing of Popery. According to the Civil and Canon-Laws, it was Sacriledge to steal any of the Sacred Implements or Furniture out of the Church. But we have no Statute against that formal Crime of Sacriledge, and yet so far consider Churches as Places to which a more than ordinary

(a) C. *unicuique* 33. *Ibid.* (b) C. *Clericos* 34, *etc. si quis etiam* 35. *Ibid.* (c) *Nov.* 131. *cap.* 7.

respect

reſpect is due, that Theft or Murther, or Mutilation committed therein, is more ſeverely puniſhed, than any of the like Crimes committed elſe-where. (*a*)

5. About the fifth Century a fourth part of the Rents of the Church was generally ſet apart for the Fabrick. But now ſince the diſtinction of Pariſhes, all Churches, except the Kings, and thoſe *de menſa Epiſcopi*, are to be repaired by the Patron out of the vacant Stipends. (*b*) And where theſe faill, the burden of Building and Repairing the Church doth ly upon the Heretors: Who muſt ſtent themſelves for that effect. But the Patron or Intrometter with the Parſonage-Tithes is bound to uphold the Quire; and to pay the Third of the Stent impos'd, where the Quire is not diſtinctly known from the reſt of the Body of the Church. (*c*) If the Heretors refuſe, being required by the Miniſter and Kirk-Seſſion, to meet and ſtent themſelves for Repairing the Church; The Lords of Seſſion, upon a Bill given in by the Miniſter, will grant Warrand to him and his Kirk-Seſſion, to conveen at a certain day for trying what Sum will repair the Church, and to ſtent the Heretors proportionably, and appoint a Collector to uplift. To the making of which Stent-Roll the Heretors muſt be warn'd. Therefore, Horning upon an Act of a Kirk-Seſſion for Stent, was found null *ope exceptionis*: The Pariſhioners not

(a) *Mackenzie Crim: Part* 1. *Tit:* 19. §. 11. (b) *Act* 18. *Parl:* 1. *Ja:* 7. (c) *Penult November* 1628. *The Kirk of Selkirk contra Stuart.*

being

being cited, nor consentg. (a) But the Lords sustained a Charge against an Heretor for his proportion of a Stent impos'd for Reparation of the Church; albeit he was not present at the laying on of the Stent: And that because of the last Act of the third Parliament of King *James* the Sixth. (b)

6. Some have vented an Opinion, That such as have only Lands in the Parish, and their Residence else-where, are not oblig'd to contribute for repairing of the Church, as not having any Benefit there by the Minister's Preaching, or administration of Ordinances. (c) Others think, that Forreigners, or Outdwellers, having Lands in the Parish, are to be charg'd with repairing the Shell of the Church; But not to pay any proportion for the Bells, Seats, or Ornaments. Neither of which Opinions can be allowed. For the distinction of the Latter is groundless, and without Foundation in Law. And as to the Former, it can as little hold: For all who have Lands in a Parish are considered as Parishioners, without respect to their Residence, as to all Parochial Burdens, which are proportioned to the Valuation of every Heretors Lands in the Parish, and not to his Quality, or to his Lands in other Parishes. 2. All the Lands of a Parish may perhaps belong to a forreign Heretor: would it not then be ridiculous to impose the Burden of repairing the Church upon poor

(a) 23. *June* 1625. *Viscount of Stormont contra his Vassals.* (b) *Spotswood Prat: Title, Kirk-men and Kirk-patrimony.* (c) *Carpzov: jus consistor: lib:* 2, *tit:* 2, *Def:* 349.

Tenents? And since Heretors that are Out-dwellers, may not only come to the Church, and reap Spiritual Advantage by the Word and Sacraments, as their Tenents do in their stead; But also may sit and vote in the Parish-meetings: 'Tis highly reasonable that they bear a proportionable burden with the other Heretors that reside there. But tho I make no distinction betwixt Out-dwelling and Indwelling *Heretors*; These ought to be liable in the first place, who have bought their own Tithes, as having most Advantage by the Benefice, whereof the Rents, as I have hinted, (*a*) were once liable to these Reparations. (*b*)

7. I must not leave the Church without noticing the Seats in it, appointed for the Ease and Accomodation of the Parishioners while they are hearing Sermon, and joining in publick Worship. Some of 'em are built and repaired at the general Charge of the Parish; In which all have a common Interest: But they may be dispos'd of by the Kirk-Session in Favours of Parishioners, according to their Ranks and Qualities. (*c*) There are other Seats which particular Heretors have built for their own use, with consent of the Kirk-session; or which they have prescrib'd a Right to by Fourty years possession, as part and pertinent of their Lands. Of these the Minister and his Session cannot dispose: But they are carried under a Disposition of the Lands. That is,

(a) *Vid: Sup: N.* 5. (b) *Mackenzie Observ: on the* 54. *Act, Parl:* 3. *Ja:* 6. (c) *Degge Parsons Counsellor, chap:* 12.

when

when an Heretor dispones his whole Lands in a Parish, the Seat in the Church possess'd by him as part a pertinent, doth go with the Lands to the Purchaser. But a partial Acquisition doth not carry a partial Interest in the Seat. And a person who bruik'd his Lands and Seat in the Church by distinct Rights, having dispon'd the Lands with Parts and Pertinents to one, and afterwards the Seat to another; the Obtainer of the particular Right was prefer'd to the Seat: Albeit the Disponers Author and his Predecessors for many years had possess'd that Seat as Part and pertinent of the Land disponed. (a) Nor was Fourty years possession of a Seat in the Quire of a Church found sufficient to defend the Possessor, in a Removing at the Instance of one deriving Right from the Patron. Albeit the Seat had been built by the Possessor's Author, and bore his Name and Arms. In regard it was alledg'd that the Pursuer not only pay'd a considerable proportion of the Minister's Stipend, whereof the Defender pay'd none, nor had any Arable-Land in the Parish: But also the Pursuer's Author was Patron of the Church, and as Superior of the Parish, had obtain'd Certification in an Improbation against all Rights to the Church or Lands. And whatever Title the Name and Arms upon the Seat might give to the Timber-work on't, they could not affect the *Area* of the Quire, as

(a) 23. *November* 1698. *Alexander Wilkison against John Lithgow.*

being the Patron's Property. (a) In the City of *Edinburgh* the disposal of all the Church-seats, is ordered by the Town-Council, and the Rents appropriate as a partial Fund for payment of the Ministers Stipends.

8. The Heretors are bound to pay for, and are stated in the property of the Bells, Books, Utensils, and Ornaments of the Church: But the Minister and Kirk-Session, to whose custody they are committed, may pursue for any of them that are abstracted or taken away. A charge for a Stent impos'd for buying of Bells to a Church within a Royal Burgh, was sustained against the Landwart-Heretors, and even against such of 'em as did expresly oppose the Stenting. Albeit the Burgesses and Indwellers would have more Advantage by the Bells. But the Titular and those having Right to the Tithes, were not found lyable for the Third of the Burden, as in Reparation of the Church. (b)

9. Every one must have some way to the Church; But cannot pretend to any special way as the neareſt through anothers Land, without proving immemorial possession of such a Gate or passage: yet no Title of possession needs to be qualified, or condescended on. (c) A person was allowed to conjoyn his Predecessors possession of a Road to the

(a) *Sir William Binning against Sir Thomas Young of Rosebank, and Jouſſy of West-pans.* (b) *February* 15. 1642, *Parish of Innerkeithing contra Lady Rosyth.* (c) *June* 27. 1623, *Neilson contra Sheriff of Galloway.*

Church

Church through his own Lands, to make up immemorial poſſeſſion of the Servitude of that Road through theſe Lands, after they were diſponed to a ſingular Succeſſor. (*a*) Becauſe the Road in controverſy was not a private Road, but *via vicinalis* ſecured to all perſons by publick Law; and Kirk-roads are not tied up to the ſtrict Rules of Law, eſpecially where the Servitude is *inoxiæ utilitatis*, and of little prejudice to the Servient-ground.

10. Some in old time, eſpecially the Martyrs us'd to be Interr'd in the Porch or Iſles of the Church, for a *memento* of Mortality to others. And as Superſtition grew under *Gregory* the Great, The *Romaniſts* began to bury in the very Body of the Church; that the Friends of the Defunct coming there for publick Worſhip, might by the ſight of his Grave be put in mind, to ſend up prayers for him. 'Tis with us the Cuſtom to this day, to allow the Corps of ſome Perſons of Note and diſtinction to ly in the Church; either for a reaſon of more Security to the Carcaſe from being violated by Raſh and wicked hands; or as a piece of Deference to the Merit, or quality of the Defunct; or perhaps on both theſe accounts. For which a certain Acknowledgement is payed to the Poor, called in ancient time *ſymbolum animæ*, or *pecunia ſepulchralis*. Theſe beſide their particular Tombs or Grave-ſtones and Ornaments of their Body, have ſometimes Coats of Arms, Penons, and other Enſigns of Honour hang'd up for their

(a) *Weems of Bogie againſt White of Bennochy.*

Memory : whereof the Property remains the Executors ; and to them *actio injuriarum*, and for Dammages is competent againſt ſuch as preſume to break, deface or take them away. I don't altogether diſapprove the laying the Bones of ſome Eminent Perſons in the Church : But it was the Opinion of *Joſeph Hall* Biſhop of *Norwich*, That GOD'S Houſe was not a meet Repoſitory for the Bodies of the greateſt Saints. Tho ſome be Interred in the Church, the moſt common Burying is in the Church-yard.

11. The Church-yard is that Spot of Ground within which the Church ſtands. Fourty Paces about greater, and 30 about leſſer Churches was the determined Extent of it by the Canon Law, and much the ſame reſpect was due the Church-yards, as to Churches : for both were Sanctuaries. (*a*) But tho ſince the Reformation we don't own them as Sanctuaries : Our Law allows to Church-yards and Churches equal Priviledges in many things, as the holding of Courts within Churches or Church yards was unlawful ; (*b*) The raiſing of Tumults or Frays within Churches or Church yards during Divine Service, is puniſhed with the loſs of Moveables. (*c*) And Manſlaughter there, doth make the Committers Liferent Eſcheat fall to the King, immediately after Declarator. (*d*) Though in

(a) C. *ſicut antiquitus* 17. *qu.* 4. (b) *Act* 86. *quoniam a achiamenta.* (c) *Act* 27. *Parl.* 11. *Ja.* 6. (d) *Act* 118. *Parl.* 12. *Ja.* 6.

Ordinary

Ordinary cases the Liferent Escheat doth not fall, till the Rebellion is Year and Day old; & then it is due to the respective Superior. The keeping of Fairs or Mercats within Churches or Church-yards, was once Discharged under the pain of Escheating the Goods. (a) But now these Acts as to Mercats in Church-yards are *in desuetude*. (b)

12. The Church-yard is Fenced with Dikes partly for Ornament, and partly as a Preservative to the dead Bodies, from being Digg'd up and Devour'd by Beasts. The building and repairing of Churches, and Church-yard Dikes was once referred to the privy Council. (c) But now the Parishioners, that is the Heretors, must build and repair the Church-yard Dikes with Stone and Mortar two Elns high, with sufficient Stiles and Entries; and the Lords of Session are to direct Letters of Horning against them for that Effect. (d)

13. The Minister has Right during his Incumbency to the Church-yard, (e) and may shear the Grass on't for the use of his Horse or Kine, and may hinder others: But cannot cut the Trees growing there; Tho there is Action competent to him against those who do cut them. (f) If there should be a Coal found in the Church-yard, I think the

(a) *Act* 83. *Parl.* 6. *Ja.* 4. *Act* 70. *Parl.* 6. *Ja.* 6. (b) *Mackenzie Observ. on the* 83 *Act* 6. *Parl. Ja.* 4. (c) *Act* 76. *Parl.* 9. *Q. Mary.* (d) *Act* 232. *Parl.* 15. *Ja.* 6. (e) *Degge Parsons Counsellour, part* 1. *Chap.* 12. (f) *Ibid.*

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ſame could not be wrought by the Miniſter, or the Patron, or yet by the Heretors. Seing that would not only ſpoil the Ornament of the Church-yard; but alſo Invert the uſe on't: which can no more be done, than it can be ſold. Now Church-yards or places deſtinated for burying, are not *in commercio*; and ſo can neither be Feued, nor ſet in Tack. (a)

(a) *Craig Feud. lib.* 1. *Dieg.* 13.

CHAP. II.

Of Manſes, and Glebes.

CONVALLUS King of *Scotland*, for the accommodation of Miniſters, firſt appointed Dwelling-places to them at their reſpective Churches, (now called *Manſes, quia ibi manent*) with a little portion of Land, which we term their Glebe, *quaſi Gleba Terræ*. And in after times, many Houſes and Lands were Mortified to the foreſaid uſes of Manſe and Glebe. Becauſe Church-men took often upon them to ſet their Manſes and Glebes in Feu, or long Tack; an Act of Parliament was made, Diſcharging that pernicious practice. (a) Yet an Heretor to whom a Vicars Glebe

(a) *Act* 79. *Parl.* 9. *Q. Mary.*

had

had been Feued a year before that Statute, was allowed, a proportional Relief off the reſt of the Heretors of Church-Lands within the Pariſh. (*a*) All Parſons and Vicars Manſes with four Acres of Glebe neareſt to the Church, were excepted from the general Annexation; and appointed for the Miniſter to ſerve the cure. (*b*)

2. What courſe was afterward taken for providing Miniſters with Glebes and Manſes, is ſhewed in the two following Sections, where they are ſeparately treated of. Only I muſt here add (what farther is common to both) That Miniſters hold their Manſe and Glebe of none but the King. (*c*)

3. In the time of Prelacy, Manſes and Glebes were deſign'd by the Biſhop, or Miniſters appointed by him, with two or three diſcreet Men of the Pariſh. (*d*) Yea, a Deſignation made by two of three Miniſters only named by the Biſhop, was approven, in regard no weighty reaſon of prejudice in the Matter was inſtructed. (*e*) And a Nottars Inſtrument of Deſignation upon a Warrand from the Biſhop and Presbytrie was thought ſufficient as a Seaſin, tho not ſubſcribed by the Miniſters who Deſign'd: But a Teſtificat under their hands, was Ordained to be produc'd before Extract. (*f*) But now when Presby-

(a) *February* 12. 1635, *Cock contra Pariſhioners of Auchtergovan.* (b) *Act* 29. *Parl.* 11. *Ja.* 6. (c) *March* 28. 1628, *Fletcher contra Irvine, Stair Inſtitut. lib:* 2. *tit.* 2 §. 40. (d) *Act* 21. *Seſſ.* 3. *Parl.* 1. *Ch.* 2. (e) *Feburuary* 7. 1668, *Miniſter of Cockburns-path contra his Pariſhioners.* (f) *December* 17. 1664, *Watſon contra Paterſon.*

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tery ſways, that is done by the Presbytrie. The Miniſter, or a Procurator in his Name takes Inſtruments upon the Deſignation in the hands of a Nottar, or of the Clerk of the Presbytrie. And upon a Petition given in by the Miniſter to the Lords of Seſſion, with the Act of Deſignation & Inſtrument; they will interpoſe their Authority, for Removing the Heretors and Poſſeſſors of the Lands deſign'd in the terms of the Act 48. *Parl.* 3. *Ja.* 6. So, Mr. *Coline Lindſay* Miniſter at *Kilbrandan* in *Seill*, having lately (*a*) apply'd to the Lords by a *Bill*, Repreſenting that the conjunct Preſbytries of *Argyle* and *Lorn*, had deſign'd a Legal Glebe to him and his Succeſſors in Office, together with Graſs for a Horſe and two Kine, preſently poſſeſſed by ſuch and ſuch perſons; wherein the Moderator gave him Infeftment in preſence of the Presbytrie; upon which he took Inſtruments in the hands of the Clerk thereof; and that the ſaid Poſſeſſors refuſed to give way to his Poſſeſſion: Warrand was granted for Letters of Horning to Charge them to Remove within 10 Days.

4. The Proprietars of the Lands deſign'd, muſt get Relief *pro rata* off the Reſt of the Heretors of Church-Lands within the Pariſh, if the Deſignation was out of Church-Lands; (*b*) not being old Glebes or Manſes of Parſons or Vicars. For there is no Relief competent to the Feuars or Tackſmen of theſe, when leſed by a Deſignation out of their Pro-

(a) *February* 9. 1705. (b) *Act* 199. *Parl.* 18. *Ja.* 6.

portion,

portion, except only againſt ſuch as have Feus of other parts of the ſaid old Glebe or Manſe. (*a*) When the Deſignation is of Temporal Lands, the reſt of the Heretors of Temporal Lands are to contribute proportionally for Relief thereof. (*b*) By the *Act* 31. *Parl.* 1644, Church-Lands Mortified to Univerſities, Schools, or Hoſpitals, could not be deſign'd for Manſe or Glebe; but ſuch being Mortified to a Colledge, and afterward Feued for a ſmall Duty, was found liable as other Church-Lands. (*c*) S. *George Mackenzie* thinks that was a circumſtantiate caſe, and doubts if it ſhould be a Precedent for Church-Lands mortified to Colledges, and remaining with them. (*d*) This Relief competent to theſe out of whoſe Lands Deſignations are made, tho conſtitute by Act of Parliament, was found, not to be *debitum fundi*, affecting ſingular Succeſſors, but only to burden the Heretors for the time. (*e*) Becauſe albeit the foreſaid Action of Relief is competent againſt them upon the account of Church-Lands they poſſeſs; yet the ſame is only perſonal. Yea, a purſuit for Relief not being commenc'd till eight or nine years after the Deſignation; theſe that were Heretors when it was made, were not found liable to pay Annualrent for the Sum decerned from

(a) *Stair Inſtit. lib.* 2. *tit* 2 §. 40. (b) *Act* 31. *Parl.* 1644. *Stair ibid.* (c) *February* 12. 1635, *Cock contra Pariſhioners of Auchtergovan.* (d) *Obſerv. on the* 199 *Act*, 14. *Parl. Ja.* 6. (d) *June* 24. 1675, *Snow contra Hamilton.*

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the time of the Designation: seing *usuræ debentur* only *ex pacto, vel mora*; and the Heretors had *bona fide* possess'd their own Lands, and made *fructus suos.* (*a*) Albeit the Notion of Relief imports to be relieved of all Dammage, under which the Interest of Money is commonly comprehended. For *non est damnum quod quis suâ culpa sentit*; and here the Party might blame himself for not requiring payment immediately after the Designation.

(a) *Dirleton Decis:* 352. *Stenhouse contra Heretors of Tweedmoor, 7 June* 1676.

SECTION. I.

Of Ministers Manses.

THE Parson or Viccars Manse neareſt to the Church was appropriate to the Minister serving the Cure there. (*a*) And those provided to Cathedral or Abbey Churches, where there was no Parson or Viccars Manse formerly, are to have one within the Precinct of the Cathedral or Abbey; unless the Prelate or Feuar Appoint them with another as good and commodious. (*b*) Yet if the Incumbent be not settled in an Abbey or Cathedral Church, but in some other, where no Parson

(a) *Act* 48: *Parl:* 3: *J:* 6. (b) *Act* 116: *Parl:* 12: *J:* 6.

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or Vicars Manſe hath been, or where it was burnt *caſu fortuito*, he cannot claim a Houſe to be deſign'd for his uſe, though ſtanding upon Church Land. (*a*) But the Heretors muſt build a ſufficient Manſe not exceeding 1000 Pounds nor under 500 Merks of value. (*b*) Or the Miniſter may build one to himſelf, and get Repetition off them for what he truly expends in the building, not exceeding the foreſaid *Quota* of 1000 Pounds. (*c*) 'Tis uſual to allow half an Acre of Ground for the Manſe and Yard.

2. By the 8. *Act*, 21. *Parl. J.* 6. all Biſhops and other Eccleſiaſticks were ordained to build and repair their Houſes and Manſes, and for ſuffering them to decay, their Executors were lyable to the Succeſſors, and thoſe to the Executors for Expenſes of Reparation made. But now, where there is a competent Manſe already, the Heretors muſt repair it once ſufficiently at the Miniſters Entry, who is to uphold the ſame during his Incumbency; and they out of the vacant Stipend in time of Vacancy of the Church. (*d*) A Miniſter having, conform to an Act of the Provincial Aſſembly 1642, paid a certain Sum to the Relict of his Predeceſſor imployed by him in repairing the Manſe; By which Act, the payer was ordained to have Repetition off his Succeſſor: The Lords found that Act to be no ſufficient War-

(a) *February* 11: 1631: *Miniſter of Innerkeithing contra John Ker.* (b) *Act.* 21: *Seſſ:* 3: *Parl: Ch:* 2. (c) *January* 8: 1670: *Chartres contra Pariſhioners of Curry.* (d) *Act* 21: *Parl:* 1: *Seſſ:* 3: *Ch:* 2.

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rand to cauſe the ſucceeding Miniſter reimburſe the intrant Miniſter. (*a*) The Building or Reparation of the Manſe affects not ſingular Succeſſors. (*b*) Nor are Liferenters ſubject to any part of the Burden of Building. (*c*) Albeit where Liferented Land is adjudg'd, the Liferent is ſtated to a certain proportion of the Property, according to the value on't, and Age of the Liferenter. But poſſibly a Liferenter by preſervation wou'd be dealt with as an Heretor in this as in ſome other Caſes. (*d*) And the ordinary Liferenters are not lyable to build Manſes, they are bound to repair them, which requires leſs Expenſe, and cannot admit of Delay. As the Miniſter may build, ſo he may repair his own Manſe upon the Expenſes of the Heretors and Liferenters, who are reſpectively lyable to reimburſe him of what he truly and profitably gives out that way: Unleſs they offer'd to contribute their own Materials, and he refus'd them. (*e*)

3. Churchmens Manſes are not alienable, nor can they be ſet in long Tack. (*f*) *Habitatio enim alii Habitanda, ex Jure Civili dari non poteſt.* (*g*) And *Domus Parochiales ad Secularem Uſum non poſſunt transferri.* (*h*)

(a) *January* 1682: *Mr. John Philp contra Mr: George Moriſon.* (b) *January* 8: 1670: *Chartres contra Pariſhioners of Curry.* (c) *Nov:* 14: 1679: *Miniſter of* contra *the Laird and Lady Beinſtoun.* (d) *Mackenzie Obſerv: on the* 48: *Act, Parl:* 3: *J:* 6. (e) *Ibid.* (f) *Act* 72: *Parl:* 9: *Q: Mary.* (g) *l:* 8: *ff: de Uſu & Habitatione.* (h) *Bruneman: de Jure Eccleſiaſtico, Lib:* 2: *Cap:* 3: *N:* 5.

SECT.

SECT. II.

Of Miniſters Glebes.

A Miniſters Glebe ſhould conſiſt of Four Acres of Arable Land, or 16 Sums Graſs, where there is no Arable, but Paſture Ground; to be deſign'd in the firſt place out of the neareſt Lands belonging Parſons, Vicars, Abbots, or Priors; and if there be none ſuch, out of Biſhops, Friers, or any other Church Lands within the Pariſh: (*a*) As Chaplainries, and Prebendries. And it was found, that this Order ſhould be exactly obſerv'd. (*b*) Therefore the Deſignation of a Glebe out of Abbots Land was reduc'd, becauſe there were Parſons Lands in the Pariſh, though Feued, and Houſes built thereon: From which the Feuers were ordained either to remove, or furniſh another Glebe to the Miniſter. (*c*) Another Deſignation was reſcinded, for that it was Temporal Lands, and paſt by Church Lands: Albeit the Miniſter, as *Decennalis & Triennalis Poſſeſſor*, had a Preſumptive Title, in reſpect the Deſignation his true Title was produc'd. (*d*) But yet Sir *G. Mackenzie* obſerves, (*e*) that Biſhops Lands

(a) *Act* 161: *Parl*: 13: *Ja*: 6. (b) *July* 13: 1636: *Halyburton contra Paterſon*. (c) *July* 23: 1629: *Nairn contra Boſwal*. (d) *February* 6: 1678: *Lord Forret contra Mathers*. (e) *Mackenzie Obſerv: on the Act* 48: *Parl*: 3: *J*: 6.

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were design'd before Abbots Lands: In regard that Bishops had more Interest in the Cure. A Designation of a Glebe was sustained, albeit Four Acres precisely were not measured and marked out, but guess'd at: In regard the same did import, that the Possessors Servants hindred to measure in the Terms of the Act of Parliament; without farther necessity upon the Minister to prove the Impediment others ways than by the Designation it self. Nor was Improbation thereof admitted by way of Exception: Seing that wou'd lay a Preparative of pernicious Consequence to Ministers. (*a*) The designing of Church Lands neareſt to the Manse for a Glebe, is partly in favours of the Minister for his Ease and Conveniency, partly to obviate Partiality in pitching upon any Heretors Lands out of prejudice. And therefore a Designation was found null at the Instance of an Heretor, whose Lands design'd were remoter than others from the Manse. (*b*) But a Designation was sustained and approven, tho there was sufficiency of Church Land nearer to the Manse: Seing that was inclos'd as a part of the Kings Park. (*c*)

2. When there is no Arable Land adjacent to the Church, the Minister should in place of the Four Acres have 16 Soums Grass out of the neareſt and most commodious Pasture Church Lands design'd for his Glebe. (*d*) According to the Order in the *Act* 161. *Parl.* 13. *J.* 6.

(a) *July* 5: 1626: L: *of Kerse contra Reid Minister.* (b) *Mackenzie, Ibid.* (c) *February* 13: 1629: *La: Dumfermling contra Mackgill Minister there.* (d) *Act* 7: *Parl:* 18: *J:* 6.

And

And farther, a Horſe and two Kines Graſs, over and above the Glebe: (*a*) Even tho the Glebe ſuffice for Graſs to two Kine and a Horſe, beſide the Four Acres; (*b*) to be deſign'd as the Glebe out of Church Lands, and with Relief to the Party diſtreſs'd. And if there be no Church Land near the Manſe, or only Arable Ground, the Heretors of the adjacent Land are to pay the Miniſter 20 Pound yearly for his Graſs, and to be relieved as ſaid is. (*c*)

3. No Incorporate Acres in Town or Village, where the Heretor hath Houſes and Gardens are to be deſign'd for Glebes, if he give other Lands neareſt to the Church: And no Miniſters in Royal Burghs have Right to Glebes; *d. Act.* 21. unleſs the Pariſhes be partly in Landwart, and partly in Town. (*d*) A Miniſter to whoſe Church another is annex'd, has Right to both the Glebes deſign'd before the Union; (*e*) as well as to both Stipends formerly paid to the Miniſters of theſe Pariſhes: Seing the Church cannot be prejudg'd by the Union. But one wou'd think, that a Miniſter of two United Churches, whereof one hath a legal Glebe already deſign'd, and the other hath no Glebe, or one that is not ſufficient, hath no Title to require another Glebe to be deſign'd for him; or to ſeek an Additional Deſignation to make up the deficient Glebe: That he may

(*a*) *Act* 21: *Parl*: 1: *Seſſ*: 3: *Ch*: 2: (*b*) *Mackenzie Obſerv: on the* 7: *Act*, 18: *Parl*: J: 6. (*c*) *Act* 21: *Seſſ*: 3: *Parl*: 1: *Ch*: 2. (*d*) *Stair Inſtit*: *Lib*: 2: *Tit*: 2: § 40. (*e*) *January* 22: 1631: *Rough Miniſter of Innerkeithing contra Ker.*

have a competent Glebe for every Church. No more than he wou'd be allow'd an Augmentation of Stipend, when the United Stipends, or any one of 'em do make up the legal Quantity. A Glebe was found to carry Right to a Proportion of Common Pasturage due to the Church Land out of which it was design'd. (*a*)

(a) *February* 2: 1630: *Hamilton contra Tweedie.*

CHAP. III.

The Historie of Tithes.

TITHES are a certain proportion of our Goods, and Rents, that is due for maintaining of Divine Service. A Subject that hath ever afforded plenty and variety of Debate through most Ages of the Christian World. My project is to make it some better understood than generally hitherto it hath been: And the first step in order to this, shall be to give as distinct an Historical Account on't as I can.

1. Tithes were voluntarly pay'd by *Abraham*, vow'd by *Jacob*, and the payment of 'em prescribed and qualified in *Moses*'s Law; which the Heathens sometimes in their Practice copied after. But when or where the payment of Tithes first began under the Gospel Dispensation I cannot tell: Only we're sure it was

was not before the 400 Year of GOD. For no Tithes could be pay'd in *France* before the Converſion of *Clovis* their firſt Chriſtian King. Nay, *Craig* is of their Opinion, who write that Pope *Boniface* the Eight introduc'd the payment of Tithes in *France*; *Vocato in partem prædæ ipſo Rege*: Without whoſe conſent the Impoſition would never have gone through. (*a*) The *Saxons* were not ſubjected to the payment of Tithes, till upon their imbracing the Faith in the Reign of *Ch.* the Great, about the year 780. (*b*) Nor thoſe of *Polland* before the Reign of *Miciſlaus* the Firſt. (*c*) And the Tragedy of *Knout* the Fourth is a cruel Evidence that there was no Warrand for payment of 'em in *Danemark* before the year 1081. (*d*) In *Hungary* I meet with no Veſtige of Tithes till the year 1047. (*e*) Nor in *Bavaria* before the year 537. (*f*) The *Engliſh* date their Converſion to Chriſtianity only from *Auguſtine* the Monk his Miſſion and Expedition into *England*, about the year 600: And *Alfred* was the firſt who paſs'd a Law for the payment of Tithes there. (*g*) There being many Evidences that *Ethelwolph*'s Charter is a Forgery. In *Ireland*, it was in King *Henry* the Second of *England* his time, that a Canon was

(a) *Feud: lib:* 1. *Dieg:* 13. (b) *Crantzii Metropol: lib:* 1. *cap:* 8. (c) *Cromerus de Reb: Poloniæ lib:* 3. *John Herbert, Hiſt: Polon: lib:* 2. *cap:* 1. (d) *Jo: Meurſii Hiſt: Daniæ lib:* 4. *Saxo Grammati. Hiſt: lib:* 11. *Crantzii Dania, lib:* 4. *cap:* 37. (e) *Vid: Aventin: Annal: Boiorum, lib:* 5. *p.* 420. (f) *Ibid: lib:* 3. *p.* 194. (g) *B. Burnet's Hiſt: of the Rights of Princes, chap:* 5.

made in a Council at *Caſsiles* 1171, ordering Tithes to be pay'd to Pariſh-churches. (*a*) Thoſe who ſtand up for the moſt antient payment of Tithes in *Scotland*, I mean *Leſly* and *Spotſwood*, do not alledge an Inſtance of it before *Convallus*, or *Congallus* the Second, as others call him, who, they ſay, appointed the Tenth of all Corns, Fruits, and Herbs, to belong to the Church. And the Learned *Craig* (*b*) will have the Cuſtom of Tithing among us to be much of a date with the famous *Lateran* Council in the year 1179. If theſe Inſtances were not ſufficient, I could alledge the practice of ſome other Nations, where my Reading has carry'd me, for farther inſtructing that there was no certain payment of Tithes before the fourth Century. *Origine* (*c*) indeed argues from the Example of *Moſes*'s Law, that the Tenths ſhould be offer'd to the Prieſts under the Goſpel. But according to *Herm. Gigas*, *Conſtantine* the Great was the firſt who commanded the payment of 'em. Yea, the Learned Biſhop of *Sarum* (*d*) ſays, That *Pepin* began, and *Charles* the Great ſettled the payment of Tithes, and other Princes generally followed their Example.

2. When at firſt Tithes were demanded and brought into the Church, it was pretended, That they were to be diſtributed among the poor; and while Chriſtians were in the Charitable Humour, the thing was ſoon yielded: But afterward the poor were put off

(a) *Vid: Gyrald: lib: de Hybernia Expugnata cap:* 34. *Hoveden in Henr:* 2. (b) *Ibid.* (c) *Homil:* 1, *in Num.* (d) *Hiſt: of the Rights of Princes, chap:* 4.

did

with a Third of 'em; and even that in the end did dwindle into nothing, by the Clergies monopolizing all to themselves. Not content with the Predical-tithes injoined by *Moses*'s Law, Personal-tithes came to be exacted. And towards the expiring of the Twelfth Century, Tithe was claimed for Hunting, Fishing, Honey, Trade, and the Commerce of Whores. Nay, the very Alms of the poor says *Spanheim*, (*a*) was scarce exempted from Tithing.

3. In the *Roman* Diocese before the distinction of Parishes, the disposal of Tithes, as of other Church-revenues, was challeng'd by the Bishop: Who made the dividend according to his Discretion, and dispos'd of the Clergy as he thought fit; sending them sometimes to one place, and sometimes to another. But the Burden growing too great for him at length, the Pastoral Care was divided into Parishes; and the Teinds of each Parish set for a provision to their particular fix'd Minister. Having formerly observ'd how and when the Parochial-division came to be introduc'd; (*b*) and also explain'd the Nature of Mother-churches, and those called *Ecclesiæ Succursales*: (*c*) It remains for us to shew what Right they had to Tithes. The *Ecclesia Matrix* was founded *Jure communi* in the Right of all Tithes within it's Territory. (*d*) Where a new Church was erected with the priviledge of a Parochial one, and independent on the former; The Rectors of both had Right to the

(a) *Oper. Theolog: Par:* 1. *Observ: in Cap:* 27. *Levit: in fin:* (b) *Vid: part* 1. *chap.* 5. *N.* 7. (c) *Vid: Ibid: & chap:* 5. *N.* 26. (d) C. *de decimus* 16. *qu:* 1.

Tithes within their respective Bounds or Precincts. (a) In the case of Chappels erected in Parishes without a Parochial-priviledge, and serv'd by Vicars put in by the Parson of the Mother-church for his own assistance, and for the Accommodation of his Parishioners; The Tithes *ipso jure* belong'd to the Parson; (b) That is the Tithe of Corn. And for the Vicars Subsistance an inferior Tithe of other annual Increase was ordinarly set apart. Which gave occasion to the distinction of Parsonage and Vicarage Tithe. But then sometimes the Vicar got even a proportion of the Parsonage-tithe for his allowance; and sometimes a modified Stipend. Those other Vicars whose business was to officiat in Parish-churches annex'd to Cathedral and Collegiat-churches, and Monastries, were maintained after the same fashion: The Parsonage-tithe being due to the Ecclesiastick or Conventual Body. Our Learned Antiquary Sir *James Dalrymple* observes no mention in the Charters before King *David*'s time of *Persona* or *Vicarius*. (c) But in a Provincial Council held in *Scotland anno* 1225, under Pope *Honorius* the Third (of the Statutes whereof there is a Copy extant in the Chartulary of *Aberdeen*) (d) we find Tithes ordained to be pay'd, *iis ad quos pertinere noscuntur*, i. e. *personis & vicariis*. Nay, The intrometting with

(a) *C. ad audientiam* 3 *Extr: de Eccles: ædificand. vel repar. Bengeus de beneficiis ad verbum Militia cap:* 4. *N.* 31. (b) *C. Ecclesiæ & duo sequentes* 16. *qu:* 1. *Bengeus Ib: N.* 32. (c) *Collections concerning the Scottish History, page* 228. (d) *cap:* 35.

Tithes

Tithes without Tacks from them, or their Farmers was once declared a point of Dittay. (*a*) The Parochial-right of Tithes is now evacuated by the late Acts of Parliament, (*b*) which confer on Patrons all the Teinds of their Benefices, not heretably disponed, with the burdens affecting the same.

4. *Craig* (*c*) is positive that the first payment of Tithes among us, was meerly the effect of Episcopal Tyranny, introduc'd about the twelfth Century; and settled with that Opposition and Reluctancy, that the Bishop of *Orkney* lost his Life in the Quarrel. As Piety and Charity decay'd, the Divine Right of Tithes began to be asserted in the Councils of the Church, and these Council-decrees were at length transcrib'd in the Body of the Canon Law: For the Clergy were extreme loath to own the Original of Tithes to Humane Laws, which are alterable.

5. But the Pope as universal Bishop, pretending a Sovereign Right to all the Revenues of the Church, took upon him to alienate Tithes to Monastries at Random. Nor hath his Holiness stood to sell them to Lay-men: For all the Tithes in *Italy*, and most of these in *Spain*, are either appropriate by him to Monks; or feued to secular Princes and Laicks. He was once pleas'd to gratify our King *James* the Fifth with the Tithes of all the Parsonages

(a) *Act* 7. *Parl*: 2. *Ja*: 4. (b) *Act* 23. *Sess*: 2. *junct*: *Act* 26. *Sess*: 4. *Parl*: *W. & M.* (c) *Feud*: *lib*: 1. *Dieg*: 13.

within

within this Kingdom for a year. (a) And not only did he assume the disposing of Tithes that were in the hands of Church-men; but even of such as Infidels possess'd: So *Urban* the Second gave to *Peter* of *Arragon* and his Souldiers, the Tithes of all Lands he should recover from the *Saracens*.

6. As he dispos'd of Tithes freely without Controul, he also granted Dispensations from payment of 'em, to such and such Religious Orders as he thought fit to have intirely depending upon the See of *Rome*: And particularly to the *Cistercians*, *Hospitalers*, and *Templars*, as to possessions they had before the *Lateran* Council. We have in another place (b) Historically describ'd the *Cistertian-Order*, and shew'd how they came to be so priviledg'd: And because some possibly may have the curiosity to know as much concerning the *Hospitalers*, and *Templars*; I shall furnish my Reader with the History of 'em.

(a) *Buchannan Hist: Lib:* (b) *Part* 1. *chap:* 2. *N.* 8.

The History of the Hospitalers, or Knights of St. John.

THE Custom of Visiting pretended Holy Places did early enough obtain. From the time that *Helen* the Mother of *Constantine* the Great did beat the Hoof to *Jerusalem*.

salem. (a) Her steps were traced by many, both Men and Women, notwithstanding the great Dangers that attended such a Journey. Among others, *Peter* the Hermite towards the end of the eleventh Century perform'd that peace of Ambulatory Devotion. Who Observing the Distressed Condition of the Christian Inhabitants in *Jerusalem*, by the Oppression of Infidels that were then Masters of the City: concerted with *Simeon* the Patriarch, how to recover it out of their hands. Being back'd with Letters from the Patriarch to Pope *Urban* 2, and the Princes of the West, he made his Applications to each of these so effectually, and Represented so feelingly the said posture of the Christian Affairs at *Jerusalem*; that in a little time he got himself, in conjunction with *Godfrey* of *Bovillon* D. of *Lorrain* at the Head of a Numerous Armie, Levied out of all the Regions in *Europe*, *Italy* excepted. The design, as they gave out, was to eradicate Pagan Superstition, and set up a Christian Government in the Holy Land. *Jerusalem* in the year 1099, fell in their hands, and *Godfrey* was chosen King thereof, which was much owing to the Valour of the *Hospitalers*, who Signaliz'd themselves at the Siege of that City, and for their Reward got Vast Possessions settled upon them by *Godfrey*, and *Baldwin* his Successor.

2. These Hospitalers were at first some Merchants of *Melphis* in the Kingdom of

(a) *In the year* 326.

Naples,

Naples, Traders in the *Levant*, who a little before *Godfreys* Expedition procur'd leave from the *Caliph* of *Egypt*, to build in *Jeruſalem* a Houſe for themſelves; and their Countrey men that ſhould travel in Pilgrimage thither; on paying a yearly Tribute. After which a Church was erected in Honour of St. *John*, and an Hoſpital for the Sick, whence they took the Name of *Hoſpitalers*. They bound themſelves to the ordinary vows of obedience, chaſtity and poverty; and farther, to Defend Pilgrims againſt the Hoſtilities of *Saracens*. They turn'd a Military order, remarkable for their black Habit, and a Croſs of white waxed Cloth with eight Points: Into which Order many perſons of Quality liſted themſelves; and inſtead of Hoſpitalers, choſe to be called Knights of St. *John*. They were rooted and expelled out of *Syria* at a time, when no Aſſiſtance could be had from the Weſtern Princes, who had Game enough at Home, and were deeply ingag'd in inteſtine Broils. Then they poſſeſs'd themſelves of *Rhodes*: which the *Turks* recovered out of their Hands in the year 1522.

3. The Emperor *Charles 5th.* in the year 1530, dealt and prevailed with them to accept of the Iſle of *Malta* for their Reſidence: where they have long been a Fence and cover to Chriſtendom from the *Turks*. *Solyman* in the year 1566, thought to reduce and extirpate them by a mighty Naval Force; which after the Expenſive Fatigue of Four Moneths War, were neceſſitate to return *re infectâ*. Princes have heaped Riches upon theſe

theſe Knights, and the Popes granted them vaſt Priviledges, and Immunities, whereof an Exemption from payment of Tithes was one. But after the *European* World began to be ſenſible of the groſs Cheats put upon them by the ſpecious pretence of *Croiſades*, and to give over theſe vain Deſigns, the Credit and Intereſt of the Hoſpitalers decay'd, except in ſuch places as were moſt expos'd to War.

4. In this Religious Order there are Knights, Noble by four Deſcents, Chaplains, and ſerving Brothers of many different Nations. The principal Convent or Hoſpital is at preſent in *Malta*; whereof the grand Maſter of the Order is Head, and Soveraign of the *Iſland*. In all Forreign Provinces where they have any Revenues belonging to them, there is a great Prior, whoſe Juriſdiction is called a *Commandery* or *Preceptory*. He from time to time holds Provincial Chapters; and muſt Account for what he does, and Receives, to the main Body of the Order in *Malta*. The chief Commanderies are for Knights, ſuch was the *Preceptory* of *Torphichen*. There are others for Chaplains. A *Commandery* of Juſtice, is that which is beſtowed upon one according to his long ſtanding; Commanderies of Favour, are ſuch as the great Maſter or Prior has the Diſpoſing of *virtute officii*. The Priors chuſe the great Maſter, who is only Subject to the Pope in Spirituals; but owns the King of *Spain* as his Protector, to whom he preſents a Falcon every year. The Hoſpitalers came into *Scotland* in the Reign of King *David*. The

Preceptors

Preceptors of this Order had Right to the Forefeitures of their own Tenents. The Governours of Hospitals appointed for poor Persons, or Invalides, were also called *Preceptors*; as the *Preceptors* of the Hospitals of St. *Anthonie* in *Leith*, St. *Leonards* beside the *Borrow-muire*, St. *Thomas* at the Foot *Leith*-wynd, St. *Laurence* near to *Haddingtoun*, and *Ednem* in the *Merse*. The Visitors of Hospitals are to be appointed by her Majesty. (*a*) And Actions for bringing Patrons and others, to Compt for their Intromissions with the Rents of them, are intented at the Chancellors Instance. (*b*)

(a) *Act* 101 *Parl.* 7. *Ja.* 5. (b) *Mackenzie Observ. on the* 27 *Act.* 2 *Parl. Ja.* 1.

The History of the Templars. Where it is Debated if Temple-Lands were Church-Lands, and fell under the Act of Annexation, 1587.

THE Order of *Templars* was set up at *Jerusalem* about the same time, and upon much what the same occasion that gave rise to the Hospitalers. Frequent Incursions being made into *Godfreys* Kingdom by *Saracens*, *Turks* and *Egyptians*, and the Roads leading to *Jerusalem* infested by Robbers; so as Travellers were much expos'd to Danger: nine generous Knights (*a*) undertook the

(a) *Anno* 1118. Defence

Defence of the *Sacred Sepulchre*, and to clear the High-ways; that Pilgrims and Paſſengers might ſafely come and go thither without Hazard or Interruption.

2. They propos'd at the beginning to live after the mode of Regular Canons, ſubjecting themſelves to the Vows of Celebacy, and obedience to the Patriarch of *Jeruſalem*. This was done in the year 1118; and they were called Templars, becauſe they had apartments allotted for them by *Baldwin* King of *Jeruſalem*, in his Palace near to the Temple. Theſe Templars ſubſiſted for nine years, by the Liberality of the King, Patriarch, and other Eccleſiaſtick Prelats. But the Order was confirmed by the Synod of *Troye en champaigne* under Pope *Honorius* 2*d*, (*a*) and got a particular Set of Rules, and a white Habit aſſigned them in token of their Innocence. To which *Eugene* 3*d*, added a red Croſs; (*b*) to ſignify their readineſs to ſpend their Blood in Defence of the Holy Land. Among the Templars as well as the Hoſpitalers there were Knights, Prieſts or Chaplains, and *Fratres Minores* or *Servientes*: and theſe Prieſts had Benefices. The Templars uſed to be Interr'd with their hands and Feet laid a croſs; and their Standart was partly white, partly black; importing peace or favour to ſuch as eſpouſed the Intereſt of Chriſt, and Terror to his Enemies. They ſtrictly for ſometime adhered to the Rules of

(a) *Anno* 1128. (b) *Anno* 1140.

their

their Inſtitution, and thereby exceedingly multiplied, and grew in Credit and Wealth. Nay, as *Matthew Paris* relates, became richer than Kings. This we'll find leſs reaſon to think ſtrange of, when we conſider that people in thoſe days, ſo poſſeſs'd with a Superſtitious Opinion concerning the Merit of a Pilgrimage to *Jeruſalem*, as if it had been half way to Heaven, may be eaſily thought to have been frank enough to Reward and Gratify ſuch as afforded them ſafe Conduct, and Defended the Holy Places. Princes alſo, and great Men who enter'd into this fam'd Order of Templars brought their Treaſures and Poſſeſſions with them.

3. But while the Templars ſwim'd in affluence and proſperity, they turn'd inſolent, and inſupportable. They diſclaimed the Superiority of the Patriarch of *Jeruſalem*, their Founder and Benefactor, and would own only the Popes Supremacy, who for Reaſons of State cajoled them with many Priviledges, ſuch as an Exemption from their Obedience to the Patriarch, and from payment of Tithes; and always interpos'd in their behalf, to get Juſtice done them in their civil Affairs. They prov'd very ungrateful by open Acts of Hoſtility and Malice to the Hoſpitalers; who had been kind and bountiful to them at their poor beginning. Nor did the Hoſpitalers fail, as occaſion offer'd to wreck their Revenge upon the Templars.

4. I omit for Brevities ſake, the particular Relation of the Warlick Expeditions of the Templars

Templars againſt *Turks*, *Arabians*, *Saracens*, and *Egyptians*; as not being neceſſary to my purpoſe. But I cannot forget the bold Anſwer given by *Otto de S. Amando* Maſter of the Temple, to *Saladin*, who having (*a*) taken him Priſoner, offered to Exchange him for his own Grand-Child that was a Captive in the Chriſtians hands. It ſhall not be ſo, quoth the proud Maſter of the Temple, for our way is only to Ranſom with the Sword: And therefore he chus'd rather to die under Confinement, than come off by the precarious method of an Exchange.

5. Maugre what Reſiſtance the Hoſpitalers and Templars could make, *Saladin*, (*b*) by the force of his Arms, poſſeſs'd himſelf of *Jeruſalem*. To Retrieve which Loſs, and to Humble that Victorious Infidel, The *decimæ Saladinæ* were Impos'd by the Pope and Chriſtian Princes.

6. The Templars having degenerated into Luxury, intemperance and effeminacy, they diſſolved in a ſad Tragedy. The Order after it had ſtood a matter of 184 years, being generaly cut off in a cruel manner, through all the Chriſtian World (except in *Germany*, where it was only Suppreſs'd) by the contrivance of Pope *Clement 5th*, and *Philip* the Fair King of *France*. Who, being highly offended at the Templars, for that he ſuſpected them concerned in the Tumults that aroſe about Debaſing the Coyn; and having

(a) *Anno* 1180. (b) *Anno* 1187.

alſo a Deſign to render himſelf Maſter of their Riches and Poſſeſſions, by his Moyen and Intereſt got *Clement* advanc'd to the Pontifical Chair, upon his previouſly ingaging under Secrecy to aboliſh that Order of Knights. Their Ruine was commenc'd in the year 1307, by the *French* King who Seiz'd all ſuch as were in his Kingdom, and Confiſcated their Eſtates. The like Cruelty was practis'd in other Countries.

7. The Pope, that he might effectually Gratifie his Patron and Benefactor, Suppreſt the Order of Templars, (*a*) in the Council of *Vienne*, (where he was perſonally preſent) not by way of Definite Sentence, *ſed per viam proviſionis apoſtolicæ, irrefragabili & perpetuo valitura ſanctione.* And all their Lands and Goods were Declared to fall under the Diſpoſal of the Holy See. A great part whereof by Advice of the Council was conferred upon the Knighrs of St. *John* of *Jeruſalem.* I ſay that only a great part of the Temple-Lands were beſtowed in favours of the Hoſpitalers; becauſe that Council decree reſerves the Goods belonging to the Templars in *Caſtile*, *Arragon*, *Portugal*, and *Majorca*; and ſecular Princes applyed much of 'em to their own uſe as *bona vacantia.* Yea ſcarce were the Templars Goods annex'd to the Hoſpitalers, any where without paying of great Sums. Their Poſſeſſions in *Caſtile* were Confiſcated, thoſe in *Arragon* tranſferred to the Knights of *Callatrava*, and many retained by the Knights

(a) *Anno* 1312.

themſelves

themſelves. *Spain* did not allow of the Decree of the Council of *Vienne*. In *Portugal* their Lands were appropriated to a new Order of Knight-hood then erected.

8. Theſe unhappy Knights Templars condemned by the Fatal Sentence of the Synod of *Vienne*, were generally Perſecuted with Fire and Sword for the ſpace of ſeven years, from the 1307, to the 1314. But in ſome places they eſcaped Death: as in *England* ſome of 'em enter'd into the Married State; and in *Germany* they were admitted into other Orders.

9. Some ſay their Crimes brought Deſtruction upon them. But whatever was the cauſe on't, Authors agree that none of theſe ill things laid to their Charge were proven againſt them. If they were Innocent, it cannot be denyed but that the Pope of *Rome*, for all his pretence to Infallibility, and theſe of the Synod of *Vienne* have been either partial, or impos'd upon. If they were Guilty, and truly Criminal, that doth argue, every thing not to be Religious, which the Church of *Rome* calls ſo.

10. The Templars came into *Scotland*, in the Reign of King *David*, where they flouriſhed to that Degree, that there were few Pariſhes wherein they had not ſome Lands. The Prior of the Order reſided at *Torphichen*. Their Prieſts or Chaplains had Benefices, and were Miniſters of the Churches of *Tulloch*, *Aboyn*, *Inchanan* and *Mary Coulter*. The Hoſpital of St. *Germans* in *Lothian* belong'd to

the Templars : But was Diſſolved in the year 1494, and the moſt of its Revenue beſtowed by K. *James* 4*th*. upon the Kings Colledge of *Aberdeen*. Sir *James Sandilands* the laſt *Preceptor* of *Torphichen* made Reſignation *ad perpetuam remanentiam*, in Queen *Marys* hands, of all the Temple-Lands in *Scotland*, who Feued them out again to him for 11000 Crowns, and the yearly Duty of 500 *Merks*, in Augmentation of her Highneſs Rental. The Temple-Lands being Erected in favours of *James* Lord *Torphichen*; he Diſponed them all for 10000 *Merks*, to *James Tennent* of *Lynhouſe*, and Mr. *Robert Williamſon* Writer in *Edinburgh*, except the Lands of *Torphichen* and *Liſtoun*, lying within the reſpective Shires of *Edinburgh* and *Linlithgow*, thoſe of *Dennie* in *Stirling*-Shire, *Thankbortoun* in the Shire of *Lanerk*, *Balintrodo* in *Edinburgh*-Shire, and *Maricoulter* in the Shire of *Kincardin*. Together with his Right to the Churches of *Torphichen*, *Temple*, *Inchmayn*, *Marycoulter*, *Aboyn*, *Tulloch*, and *Kilbartha*, and the Teinds and Rents thereof; Some Temple-Lands in Eaſt *Lothian* and *Fife*, were afterwards made over to Mr. *George Lauder* of *Baſs*, and theſe within the Sheriffdom of *Perth*, and Stewartry of *Strathern*, to *David* Lord of *Scoon*. And yet *Tennent* and *Williamſon* convey'd their whole Right with conſent of the Lord *Torphichen*, to *Thomas* Lord *Binnie*, afterwards Earl of *Haddingtoun*; By whom the Lord *Scoon's* Right was Ratified; and the Temple-Lands within the Shires of *Dumfries*, *Lanerk*, and *Wigtoun*,

and

and within the Stewartries of *Annandale* and *Kirkcudbright*, were transfer'd to Captain *William Roſs*, and came from him by progreſs in the perſon of *Roſs* of *Auchloſſin*, who having rais'd a Reduction and Improbation of the Rights of the Poſſeſſors. It was alledg'd for the Defenders, they were not bound to produce their Evidents to the Purſuer, becauſe Temple-Lands were Church-Lands, and conſequently fell under the Act of Annexation 1587, and that they were Church-Lands was contended upon theſe Grounds.

1. The Templars were an Eccleſiaſtick Order inſtituted by the Patriarch of *Jeruſalem* for a pious Uſe, ſubject to the *Tria Vota Subſtantialia Religionis*, Poverty, Chaſtity, and Obedience, which were at firſt adminiſtrat to them by the Patriarch. 2. They had Prieſts among them, and have been reckon'd Eccleſiaſticks by Divines, Canons, and Canoniſts. 3. They enjoyed the priviledges of Churchmen, being exempted from Civil Juriſdiction. 4. The Order had its Confirmation from a Council of the Church, who preſcribed them Rules and Habit, to which the Pope added a Red Croſs to be worn by the Knights and Prieſts. 5. Pope *Clement* the 5. in his Epiſtle to the King of *France* (a) expoſtulates with him, for having impriſon'd the Templar Subjects of the Church *abſque medio*, and ſeiz'd their Eſtates, which did not belong to the Secular Power. And the Doctors of the *Sor-*

(a) *October* 27. 1307.

bon, by their Reſolve, (*a*) Declare, *That thoſe who are liſted for the Defence of the Faith, and have made Profeſſion of a Religion eſtabliſhed by the Church, ought to paſs among the Religious, and enjoy the Benefit of Exemption; and their Eſtates ſhould be reſerved to the Ends for which they were conferred on them.* Nor would the Pope ſuffer King *Philips* Proceſs to go on againſt the Templars, till once the King had put ſome of the principal of 'em in the Hands of his Legates. The Pope alſo reſerved to himſelf to judge the Great Maſter of the Temple, and the Maſters or Heads of the Order in *France*, and beyond Seas. At length, by the Pope in a Council of the Church, the Order was ſuppreſt, and their Eſtates diſpos'd of.

It was Anſwered for *Auchloſſin*, 1. The Templars conſtantly paſs'd for a Military Order, and were improperly called Eccleſiaſticks; being originally inſtitute, not for any ſingular Spiritual Perfection, ſuch as Devotion or Charity, but for Guarding the High Roads with Force of Arms; whereby they were exercis'd in Blood and Violence: And no more Eccleſiaſticks, than the Popes Guards, or other Princes who engag'd in the Holy Wars, or even the Souldiers that ſerved under them in theſe Expeditions, who all wore the Badge of the Red Croſs, and received from the Pope the Red Standart. Neither were their Vows like thoſe of the *Religieux*: For their Vow of Chaſtity did not tie them up to a ſingle Life, but

(a) *March* 24: 1308.

implied

implied only Continence, which might have been obſerved in a Married State; Obedience with them, was only Submiſſion to the Maſter of the Order; and their Poverty, a meer Reſtriction not to acquire without a Diſpenſation from the Grand Maſter, a thing as often granted as required. (*a*) Farther, the being tied to Vows, was not the main end of their Inſtitution; but ſome thing *accedens præter naturam.* Albeit they made their firſt Vows in the Hands of the Patriarch of *Jeruſalem*, as Vows in theſe days us'd to be made in the Hands of Church Men; they were not for that Eccleſiaſticks: Such a Ceremony being only us'd for the more Solemnity, and in order to obtain the Patriarchs Benediction. 2. Tho this Order had Prieſts belonging to it, that doth no more make it Eccleſiaſtick, than the Order of the Garter can be reckon'd a Religious one, from their having S. *George* for Patron, and a Prelate for Chancellor, and Regiſter; Beſides a Dean and Canons, and Twenty Six poor Knights to pray for the Order. As to the Opinion of Canoniſts; This in general is to be obſerv'd, that where they belong to a Countrey or Order much devoted to the Church of *Rome*, they are uſually ſway'd to think the Military Orders of Knighthood to be Eccleſiaſtical: And thoſe who are more free, and leſs depending upon that Church, incline to the Opinion, that theſe Orders are Secular. 3. The Doctors, who generally al-

(a) *Carleval: de Judiciis, Tit:* 1: *Diſp:* 2: *Sect:* 3: *N:* 406.

low them *Privilegium Fori*, are very far from granting, that they were a Religious Order: (*a*) This Exemption was the Effect of their Greatneſs, and the Indulgence of the Church of *Rome*; but did not alter the Deſign or Character of the Order from Secular to Eccleſiaſtick. 4. The Templars were ſeveral Years inſtitute before they were confirmed, or received any Rule or Habit from the Council of *Troyes*. As to the extraordinary power the Pope did arrogate to himſelf, in the Trial, Suppreſſion and Diſpoſal of the Goods of the Templars; it will amount to no Argument with any who are in the leaſt converſant in the Hiſtory of theſe times; wherein there was nothing civil exempted from the ambitious Pretenſions of theſe Pontifs. And yet in this Matter the Pope proceeded by his own Confeſſion, without obſerving the Forms of Law or Juſtice: Which, if the Templars had been an Eccleſiaſtick Order the Pope and Council would never have confeſs'd. For it is but too well known, with how much Arrogance they pretend to diſpoſe of Eccleſiaſtick Orders and their Revenues. However this Decree, after all, was no where made effectual to the Knights of S. *John*, without payment of great Sums. And the Application of the Temple Lands in their favours was ſo qualified, as it might not prejudge the Rights of Princes. As to the Judgment of the Colledge of *Paris*; There is no doubt, but this Order having a Reſemblance

(*a*) *Carleval: Ibid.*

of

of a Religious one, did plead an Exemption both from the Secular Jurisdiction, and from the ordinary Jurisdiction of the Church; and were only subject to the great Master: By whom their Benefices were conferred *pleno jure*, and their Vows dispens'd with. Nay, farther, *Mariana* observes, that sometimes the Order proceeded to depose their Master, to accept of his Resignation, and to chuse a new one, without the Popes Licence or Confirmation. 'Tis also to be observ'd, that the Doctors of the *Sorbon* do not call the Templars Religious, but only say, they ought to pass amongst the Religious. As to the Resolution concerning the Application of the Goods of the Templars to the ends for which they were at first conferred on them: That doth not determine, if the Goods were Ecclesiastick or not; but was a Check upon the Avarice and Revenge of *Philip* the Fair. 5. 'Tis observ'd in a Manuscript suppos'd to be Sir *John Nisbets*, that, in Solemn Processions, or Meetings of Parliament and Convention of Estates, the Preceptors of these Orders were ranked with the Laity; and as such were Tax'd in order to the payment of publick Burdens; nor were their Lands comprehended in the Acts touching the Assumption of the Thirds of Benefices. And albeit they had Churches, whereof they were the proper Patrons, to which my Lord *Torphichen* pays yet a considerable Stipend: Yet that did not make them Ecclesiastick.

In the foresaid Reduction and Improbation, this point also fell under Debate, if, upon the

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Supposition that Temple Lands had been originally Church Benefices ; They be not excepted in the Act 1587, and if that general Exception be taken away by the Acts 1633 and 1661.

It was alledg'd for the Pursuer, That *esto* they had been Church Lands from the beginning ; Yet the Order being suppress'd 200 Years before the Reformation, the Act of Annexation made upon that occasion does not comprehend Temple Lands, which had fallen to the Crown long before, not upon the general Account of Reforming the Errors of the Church of *Rome* ; but because *Croisades*, and the end for which the Order of Templars was instituted, the affording Reception and safe Conduct to Pilgrims at *Jerusalem*, was of a long time ceas'd. 2. Tho Temple Lands fell under the Act of Annexation, they were again excepted from it expresly in a Clause concerning the Lands and Lordship of *Torphichen*, which was not taken away by the general Act 1633. Since *illud non agebatur* to take away the special Exceptions ; but only to extend the Act 1587 that only concerned Benefices then possess'd by Church Men, to the Right and Superiority of all Lands erected before or after the General Annexation. And these Reservations being in a Solemn Act full 40 Years before the 1633, must yet subsist, unless they had been expresly rescinded. 3. 'Tis true the Act 1633 mentions the Superiorities belonging to whatsoever Abbacies, Priories, Prioresses, and Preceptories: But that

is

is to be taken in a proper Senſe, ſo as not to be underſtood of Commendams or Preceptories pertaining to Military Orders; theſe being but a Reſemblance of Benefices. And for clearing that theſe Acts do only concern the Benefices of Churches, Abbeys, Convents, or Hoſpitals; The Act 1587 narrates, *That our Sovereign Lord perfectly underſtanding the greateſt part of his proper Rent to have been given away to Abbeys, Monaſtries, and others of the Clergy, for Cauſes found to be neither profitable nor neceſſary; It is meet and expedient for the King, to have Recourſe to his own Patrimony: Therefore His Majeſty and Eſtates unite to the Crown all Lands, &c. which then pertained to Arch-Biſhops, Biſhops, Abbots, Priors, Prioreſſes, or other Prelates, Eccleſiaſtick or Beneficed Perſons of what ever Eſtate, and to Abbacies, Convents and Cloiſters of what ever Order of Friers, Nuns, Monks, or Channons.* And albeit the Act 1633 adds the Word *Preceptories*, yet it plainly relates to the Act 1587, and concerns the ſame Subject, with this Extenſion only, That whereas the Act 1587 was confined to Benefices in the Poſſeſſion of Church Men at that time; The Act 1633 doth annex all Lordſhips erected before or after the Act. And the Additional Word *Preceptories* is only to be underſtood of Eccleſiaſtick Preceptories.

I return from this Digreſſion, which perhaps is carried too far, to proſecute my Diſcourſe concerning Tithes.

A Continuation of the History of Tithes.

TO secure the Papal Grants of Alienation and Exemption, from being called in Question upon the account of the Divine Right of Tithes: The School men maintain'd a competency out of them to be due *de jure divino*; but that the particular Quantity of a Tenth was of Ecclesiastical Institution.

2. The Pope having usurped such a boundless Liberty of appropriating Tithes to Monastries, or otherways disposing of them at his pleasure, and granting Exemptions to severals of his Creatures and Favourites from paying Tithes for their own Lands, to the great prejudice of the Parochial Ministry; Our Law to exclude these his unjust pretences; made it criminal to take a Right of Tithes from any save the Parsons or Vicars, or their Farmers. (*a*) For the Kings and Parliaments of *Scotland* have been alway Zealous in maintaining the *Regale* and Rights of the Church against all Romish Usurpation. But at the same time Tithes in this Country were frequently mortified to Cathedral and Collegiat-churches, Chappels, Monastries and Nunneries, by the Founders and benefactors. To these also Parish-churches with their Tithes were often annex'd by the Patrons; so that the Prelates of

(a) *Act* 7, *Parl*: 2. *Ja*: 4.

Churches

Churches and Monaſtries had Right to two kinds of Tithes; One belonging to them ſimply by Mortification from Lay-men; Another to them only as *Parſons* of *Pariſhes*. This leads me unawares to inquire how and when Tithes came firſt into the hands of Laicks?

3. This is certain, that Lay-men injoyed Tithes, and diſpoſed of them freely for ſeveral Ages under Chriſtianity. But the Learned are extremely divided in their Sentiments about the Origine of Infeudations of Tithes. Some extravagantly will have them to be more antient than the Church it ſelf: Becauſe *Cicero* and other *Pagan* Authors mention Tithes to have been raiſed by the *Romans* out of their *Provinces*. Other place their Beginning under *Philip Auguſt*, in the time of the Holy War. A third ſort derive it from *Charles Martel*. Without ſtanding to diſpute which of theſe are moſt in the Right, I ſhall content my ſelf to notice (till I get more Light) That in a Council (*a*) held 1078. under Pope *Gregory* the Seventh, by an expreſs Canon, Laicks are diſcharg'd to poſſeſs Tithes, whether they have them from Biſhops, or Kings, or any other perſon; with certification, that the not reſtoring them to the Church, infers Sacriledge, and the hazard of eternal Damnation. Which is repeated in the general Council of *Lateran* 1139, under *Innocent* the Second, *Can.* 10. Whence I conclude that the feuing of

(a) *Concil: Roman.*

Tithes

Tithes by, and to Lay-men, is a practice more antient than these Canons.

4. Many alledge the first Infeudation of Tithes proceeded only from Church-men: Of which the Defence of the Church from being a prey to Infidels was sometimes the Onerous Cause. They tell us also, that Tithes have been sometimes feued only to oblige and incourage Heretors to bring in and cultivate *Novalia*: And that Church-men again frequently chus'd to dispone their Tithes, especially such as lay at any great distance, for a certain Duty, rather than undergo the uneasie trouble of seeking them in. But I rather incline to the Opinion of Mr. *Selden*, (a) who ascribes the Original of Feudal Tithes to Lay, and Clergy-men without distinction.

We may here observe, (without ingaging in the Dispute about the *Regale*) That Christian Princes, to oppose the barbarous *Huns*, *Goths*, and *Vandals*, carrying all before them in *Europe* in *Justinian*'s time, were in a manner necessitate to usurp the disposal of the Revenues of the Church, and make Alienations and Grants thereof to their Lay-subjects, in order to endear them to their Service, in maintaining of an expensive War, when Religion and Liberty, Property and all was at the Stake. This was sometimes done in a manner grating and disobliging to the Church. But I find none so much blamed and spoken against in History on that account, as *Charles Martel*,

(a) *Hist: of Tithes, chap: 6. N. 4.*

because

becauſe he would not make Head againſt the *Moors*, when they having ſubdued *Spain*, were going to invade *France*, till once the Clergy reſign'd their Tithes to him for payment of his Army; and did not reſtore them according to his ſolemn Promiſe, after GOD had bleſs'd him with Succeſs and Victory. For which the Clergy have indeavoured to blacken his Memory, by making a Story to paſs of a Revelation to St. *Eucherius* Biſhop of *Orleance*, That *Martel* was damn'd for robbing the Church: Altho this *Eucherius* (as *Baronius* reckons) died ſome years before him, and ſo could ſee no Viſions after his Death. However it is reported, that *Pepin Martel*'s Son would be inter'd with his Face downwards, to expiate his Father's Tranſgreſſions. *Selden* (*a*) diſproves the common Tale of *Martel*'s taking away the Tithes, and giving them to the Laity: Alledging that tho he was a Robber of the Church, he never meddled with the Tithes. *Dupleix* owns that Prince to have uſurped the Tithes, and withal contends that he was leſs criminal for not making Reſtiturion, than the Clergy for their Avarice and Ingratitude to ſo generous a Protector. Others, (*b*) who go about to excuſe the Matter, turn over the blame of the ill conſequences of *Martel*'s Uſurpation of the Tithes, upon the Avarice and Impiety of his Captains. They alledge that Prince meant no more than only to apply the

(a) *Ibid: cap: 5. N. 3.* (b) *Traite touchant l' origine des diſmes, chap: 6. ſect. 5.*

Fruits

Fruits of the Tithes for payment of his Souldiers during the War: But that these Gentlemen, loath to part with so sweet a Bit, indeavoured to perpetuate the Injoyment to their Families: Notwithstanding all indeavours of *Carloman* and *Pepin* to the contrary.

6. *Pepin*, for that he could not get the Church altogether reponed to their former Right, because of Intestine Wars: He oblig'd the Laick possessors of Ecclesiastick Benefices to take Leases or precarious Feus of them from Church-men for payment of both Ninths and Tenths, or double Tithes; and with all to be at the Expense of repairing the Churches. (*a*) Wherein he was followed by *Charles* the Great, who ratified the Obligement to pay that double Tithe of a Ninth and Tenth: But put it in the Option of the Ecclesiasticks to renew the Leases or not; and ordained those Laick Beneficiaries called *Medietarii* from their dividing the Rents with the Church, and getting half of the Fruits for cultivating a piece of Church Land, to pay the Tithe of their own proportion to their proper Minister. *Charles* the Great having conquered much of *Germany*, he settled Episcopal Sees there, and indowed them with vast Revenues. Particularly he appointed a Tithe to be payed out of all his own Revenue, and out of all Forefaultures. (*b*) And I find mention in some of our old Chartularies of the second Tithes of the Casuali-

(a) *Thomassin la disipline de l' Eglise, part* 3. *lib.* 3. *cap.* 2. *N.* 6. (b) *Anno* 789. *C.* 17.

ties

ties of Ward, Relief, Marriage, Fines, Escheats, and Un-laws of Courts. That Great Prince did by another Law (*a*) appropriate the Tithes to the Parish-church.

7. But tho *Charles* the Great made many Laws for the payment of Tithes, which are extant in his Capitulars. Yet in after Ages Princes and others dispos'd of their Tithes as they pleas'd; and commonly to Nunneries and Monastries: Thinking that a Corporation of Prayers would be more effectual than the Devotion of a single Priest, to draw down Mercies and Blessings upon the Benefactor. Our Kings and great Men did appropriate Churches with their Tithes, not only to Monastries but even to Bishopricks; and for maintaining the Fabrick of Cathedrals, and of Wax-candles therein. Many Rights of Tithes in Favours also of Lay-men are to be seen in the Chartularies of Abbacies.

8. The Clergy hath us'd mighty Endeavours to get the Tithes out of Lay-hands; Nor have frequent Bulls from *Rome* been wanting for that effect. And for incouraging all Men to give Liberally to the Church; and withal, to remove any Objection that might arise from Church-mens dilapidating or giving away the Church-revenues, many Canonical Decrees were made against conveyances of Tithes to Laymen. But the first effectual Law that came from *Rome*, for hindring them to pass from hand to hand in common Commerce, was the

(a) *Anno* 804. C. 3.

famous

famous *Canon Prohibemus* 19. *Extr. de decimis*, made in the Council of *Lateran*, under *Alexander* the Third in the year 1179. Whereby Laicks with-holding Tithes on the peril of their Souls, are discharg'd to make them over to Lay-men, and the Receiver that does not restore them to the Church, is not to have Christian Burial.

9. Our Law has so far gone in with the Canons, That Tithes (which we call the proper patrimony of the Church, (*a*) and Spirituality of Benefices) could not since the *Lateran* Council be set in few, or long Tack, before King *Charles*'s Decreet Arbitral upon the Surrender: And therefore were not annex'd to the Crown by the 29 *Act*, 11 *Parl. Ja. 6th.* But left with the Church as formerly. I confess the 189 Act of that same Kings 13 *Parl.* bears, *The Teinds of the* Lordship *of* Dumfermling *to be annex'd to the Crown, according to the Tenor of the Act of Annexation* 1587, *whereby all the Teinds of the Remanent Kirk-lands and Prelacies of the Kingdom are annex'*d. But that Clause is not Authentick, and seems (as Sir *George Mackenzie* thinks) (*b*) to have been insert through mistake, contary to the Design of the Act.

10. *Decimæ inclusæ, nunquam antea separatæ*, which for a long time beyond the Memory of Man, have always gone along consolidate with the Stock, were ever understood and

(a) *Act* 10. *Parl*: 1. *Ja*. 6. (b) *Observ*: *on the* 29. *Act* 11. *Parl*: *Ja*: 6. *N*. 7.

sustained

ſuſtained in our Law, as an Exception without the Verge of the Canons prohibition. Becauſe theſe are preſum'd to have been feued out by Church-men as Proprietars of both Stock and Teind, before the *Lateran* Council. But yet by the general Act of Annexation 1587, where Lands are feued *cum decimis inclusis*, and a joynt Duty pay'd for Stock and Teind; The Titualr or Church-man is to have the Tenth thereof, and the King the other nine parts, with the intire Superiority.

11. The Teinds were not annex'd to the Crown with the Temporality of Benefices; yet after the *Thirds* were found an ineffectual provſion for the whole Miniſtry: The King was frequently importun'd and prevail'd with to erect them into Parſonages, and give the Patronage to ſome Erection-Lord, who ordinarly got Tacks of the Teinds from the Miniſters they preſented. Commiſſions of Parliament were alſo named from time to time for planting of Churches, and modifying Stipends out of the Teinds: And the firſt of that kind appointed by the 3 *Act*, 22 *Parl. Ja.* 6. with power to call before them all Patrons, Tackſ-men of Teinds, and other pretenders thereto; and to examine their Titles, and aſſign out of the Teinds of every Pariſh to their Miniſters, being uncompetently provided, perpetual Local-ſtipends, not under five Chalders of Victual, or 500 Merks, where the Fruits of the Benefice might affor'd it; nor above 1000 Merks or 10 Chalders of Victual; beſide Manſe and Glebe. And to recompence

perſons leſed therein, by prorogation of their Tacks, or otherways, as they, the Commiſſioners thought fit. They were alſo authoriz'd to unite or diſunite Churches when that ſhould be found convenient. But not to meddle with any Miniſters already ſecured in 500 Merks, or five Chalders of Victual, or more of Stipend, tho exceeding the foreſaid higheſt Quantity of 1000 Merks, or ten Chalders. That Commiſſion expiring at *Lambaſs* 1618, while many Churches remained unprovided of ſutable Stipends, and Incouragement for Miniſters: Another was appointed in the year 1621, much in the Terms of the former; with farther powers to erect and provide new Churches, tranſplant others to more commodious Situations, and modifie Stipends without being ſtinted to a determined *Quota*. But not to alter or meddle with any Church ſettled by the former Commiſſion. (*a*)

12. King *Charles* the Firſt at his coming to the Throne, being ſenſible of the great addition that might have been made to the Crown Revenue, by the ſuppreſſing of Popiſh Benefices, had not his Father raſhly gifted them away: He in the year 1625, the firſt of his Reign, ſtrongly attacked the Erections with a Revocation the moſt ample that ever was made, of all Deeds done in prejudice of the Crown, particularly of all Erections of Church-lands, Teinds, Patronages, and Acts of Parliament ratifying the ſame. Erections were

(*a*) *Act* 5. *Parl.* 23. *Ja.* 6.

13. Erections

granted both before and after the Act of Annexation. These granted before proceeded upon the Dimission and Resignation of the Ecclesiastick Titulars, and were quarrelled upon the following Grounds of Nullity. 1. These Titulars being naked Liferenters, had no power to resign, and Resignations *in favorem* were null; As also, all Rights to Prelacies, before they fell vacant, by the Possessors decease, Forfeiture or simple Dimission. 2. The King being only Patron and not Superior, had no power to to accept such Resignations, but only to present a new Titular. And as his Majestie could not *sede vacante* have erected these Benefices directly into Temporal Lordships, *quia sede vacante nihil innovandum*; neither could that be done indirectly upon the Titular's Resignation. 3. Alienations or Rights of Benefices by Church-men to the enorm Lesion of their Successors, or whereby the Benefice is put in a worse State than at the Titular's Entry, are null. 4. All Lands unjustly taken from the Church should be restored, and the King by his Coronation-Oath was bound to maintain the Rights and Liberties on't. 5. The Thirds of all Benefices were to have been imployed for Ministers Stipends, till the Church came to the full possession of their proper Patrimony the Tithes. Erections granted after the Act of Annexation were impugn'd, particularly upon this Topick, That the annex'd Property could not be disponed without a previous Dissolution in Parliament; And his Majestie might reduce Alie-

nations made by his Predeceſſors to the Enorm Leſion of the Crown; Kings in that caſe being always conſidered as Minors, and the Parliament in place of Tutors to them. The Royal Revocation is ſometimes emitted by way of Proclamation, and the Parliament ratifies it; (*a*) Sometimes by way of Inſtrument. (*b*) But ordinarly it paſſes firſt under the Privy Seal, and then is confirm'd in Parliament; after which manner this Revocation was expede. (*c*)

13. This Revocation made a great noiſe, and was thought to have been partly the Occaſion of the Troubles that followed in that Prince's Reign. All the Poſſeſſors of Tithes and Church-lands grudg'd at it; the Earls of *Kinnoul*, *Marr*, *Melroſs Roxburgh*, and *Mortoun*, declar'd openly againſt it; the Earls of *Huntly*, *Marſhal*, and *Nithſdale*, were for it. His Majeſty called up the diſſenting Lords to a Conference at *London*, where he told them that a Revocation was not a Novelty, but competent to him *Jure Regni*, according to the antient Law and Cuſtom of his Kingdom of *Scotland*; that no prejudice was intended thereby to any perſon *in patrimonialibus fundis*; that publick Intereſt required to paſs from Church-revenues, and other Mens Tithes; that every one ſhould have the buying of their own Tithes; and that Vaſſals of Church-lands ſhould hold of the King. The Nobility anſwered unanimouſly that Revocations were a Grievance to the Na-

(a) *Act* 51: *Parl*: 4: *Ja*: 4. (b) *Act* 70. *Parl*: 6. *Ja*. 5. (c) *Act* 9. *Parl*: 1633.

tion,

tion, and had of a long time gone in desuetude; That his Majesties Father, *&c.* having bestowed on them and their Predecessors Monastries and Tithes, when there was no Money to reward their good Services, these cou'd not in Law be taken from them without Compensation. Some days were spent in the Debate. But the King persisting in his Resolve to have them either to part with their Rights to other Mens Tithes, for a reasonable price to be pay'd by the Heretors, and to resign their Superiorities of Church-lands, refering themselves to his Royal Bounty for a Recompence; Or else they should have a Tryal at Law for it: These Peers thought fit to gratifie his Majesty by a Complyance as to their part.

14. The King being afterwards inform'd, That others were unwilling to go into his Terms, and resolv'd not so easily to drop their Rights and Pretensions: A Summonds of Reduction and Improbation was rais'd in *August* 1526, upon the Revocation. Those who found themselves concerned therein, gave Commission to the Earls of *Rothes* and *Lithgow*, to go up with an Address to the King, and lay the Grievance and hardship of the Case before him. It was no sooner noised at *London*, that they were putting forward to deliver the Message; but the King's Letters came to stop them from proceeding in their intended Journey. Which they receiv'd as they were upon the Spur at *Stamford*, and obeyed, by tarrying there till farder Orders. The Petition was sent up to Sir *William Alexander* of *Menstrey*,

then Secretary of State, and afterwards Earl of *Stirling*, by whom it was presented to the King. His Majesty disrelishing it, as of Strain too high for Subjects and Petitioners, forbad them to see his Face. But being pacified in a little time by the Interposition of the Secretary, and the Earl of *Monteith*: They obtained leave to come up to Court upon acknowledgment of their Error, and were again received into Favour. At their first Audience, the King said (alluding to their Youth) that they had been treated like so many young *Does*, whom the old ones, finding themselves hotly pursued, and in hazard of being taken, cunningly expose to the Hunter's Fury, to save their own Carcases. With that he dismiss'd them, and remitted to Secretary *Alexander*, and the Earl of *Monteith*, to hear and confer with them upon the Grounds of their Commission. By whom, after frequent meetings, they were brought to approve of the Revocation, with a Quality; To consent that Ministers should have Stipends out of the Teinds of their own Parish; And the King an Annual Pension out of all Teinds; And promised to use their Interests and Indeavours in *Scotland* for bringing these things about, according to his Majesties desire.

15. The King pleas'd at length with these Compliances, and Resolutions; restricted the Generality of his Revocation to Alienations of the Crown and Ecclesiastick Revenue, made contrary to Law. For Ridding his Subjects of their Fears and Jealousies, and that they might

not

not be put to unneceſſary Charges, in repairing to Court to Treat with him, he was pleas'd to grant Commiſſion to ſome of the Nobility, Gentry and Clergy to deal with thoſe who had any Right to Church Lands, Teinds, Patronages, and others falling within the compaſs of the Revocation, concerning what ſhou'd be done and given by, and to them; and to make Acts thereupon, which his Majeſty promiſed *in Verbo Principis* to Ratifie and Approve in the firſt Parliament; But not to conclude finally in any point, without previouſly acquainting his Majeſty therewith.

16. The ſaid Commiſſion (to which *James Primroſe*, and *James Law* were appointed ſole Clerks) conveen'd and ſate at *Edinburgh* from *January* to the laſt day of *June* 1627. During which time, they made a conſiderable progreſs in the buſineſs committed to their care. They ordained a conſtant Annuity to be paid to the King out of all Teinds, except thoſe belonging to Biſhops, Miniſters, Colledges, Hoſpitals, and other pious Uſes; that is Six Merks of every Hundred of Teind payable in Money; and out of every Teind Boll of the beſt Wheat, Ten Shilling; of the beſt Bear, Eight Shilling; of Oats, Meal, Peaſe, and Rye, Six Shilling; and where Oats will not render above half Meal, Three Shilling. And where the Victual was of inferior Goodneſs, his Majeſties Annuity to be modified proportionally. (*a*) Where there is no Valuation, they appointed

(a) *May* 29: 1627.

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the Annuity to be uplifted according to the fifth part of the current Rent. (*a*) Theſe Acts were Ratified in Parliament. (*b*)

17. The Kings Annuity, not being annex'd to the Crown, was diſpon'd by the King to *James Livingſtoun* one of his Bed Chamber, in Security and Satisfaction of 10000 Pounds *Sterling*; which he Tranſacted with the Earl of *Loudoun*. But that Right having taken little Effect during the Troubles; The Earl, at the Reſtoration, got a Commiſſion from King *Charles* 2, to ſell every Man his own Annuity, and to compone for bygones; and to value Tithes, that the Annuity might be known. Who was to diſpone with conſent of two of the Lords of Exchequer, and the Diſpoſition to be Regiſtrate in their Books, for inſtructing what was received. Many bought their Annuities by vertue of that Commiſſion, which was renewed in favours of *James* Earl of *Loudoun* after his Fathers Death. He proceeded therein, till a Stop came from the King in the Year 1674, with a Proclamation diſcharging all Annuity preceeding the Year 1660: And ſince then, we have heard no more on't.

18. Having ſufficiently ſpoken to what followed on the Act of Commiſſion, in relation to the Kings Annuity: I ſhall ſhortly relate what more they did, in purſuance of the Truſt committed to them. They referr'd the Compoſition to be paid for the Feu Duties and other conſtant Rent of Superiority to the

(a) *March* 23: 1631. (b) *Act* 15: *Parl*: 1: *Chr*: 1.

King,

King, (*a*) and found, that all Superiorities of Erections ſhould be reſign'd to his Majeſty freely. (*b*) The Teinds pertaining to the City of *Edinburgh*, were by the Kings Letter ordained to continue in the ſame State they were in before the Revocation, which was Ratified by the Commiſſion. (*c*)

19. The Parties concerned having acquieſc'd in the Determinations of the Commiſſion; That all Matters of Difference might be the more calmly and ſpeedily adjuſted; Four Submiſſions to the King were ſucceſſively drawn. One by the moſt of the Lords of Erection, Titulars, Tackſmen, and others having or pretending Right to the Temporality or Spirituality of Benefices, and the Heretors deſiring to buy their own Teinds, containing a Procuratory of Reſignation in the Kings Hands, *ad perpetuam remanentiam*, of their Rights to Superiorities; referring to his Majeſty the Compoſition to be given to them for the Feu Duties and other conſtant Rent thereof: And for reſigning their Rights to Teinds, except the Teinds of their own Lands; referring to his Majeſty to determine the Rate and Quantity of the Teinds ſubmitted.

20. None, with leſs reaſon, conceived greater Fears of the Kings Revocation than the Biſhops. Who therefore ſent up *Adam Ballenden* Biſhop of *Dumblane*, and Mr. *John Maxwel* one of the Miniſters of *Edinburgh*, to repreſent to his Majeſty their Apprehenſions, that the Com-

(a) *May* 29: 1627. (b) *June* 29. 1627. (c) *November* 28: 1627.

miſſion

miſſion of Surrenders would undo the Church. They cou'd not be ſatisfied, how the Teinds, that, in the Act of Annexation, were particularly reſerved as the Patrimony of the Church, ſhould be ſold and diſponed to the Heretors. Whereupon the King endeavoured to clear them in the matter, by a Letter explaining the Commiſſion, and his own good Intentions to have Churches ſupply'd, that were not already ſufficiently provided; the Crown Revenue increas'd; and to give every Heretor his own Tithes upon reaſonable Terms: Withal he chid them for their want of Charity, and groundleſs Fears. The Biſhops and the reſt of the Clergy finding the King bent upon the thing, were at length induc'd to make a Submiſſion of all their Teinds, whereof they were not then in Poſſeſſion, by drawing the Teind, or uplifting Rental Bolls; leaving the Heretors, who were lyable in theſe Teinds, to ſubmit themſelves as to the Kings Annuity.

21. Some few Titulars having ſhifted to ſubſcribe the firſt General Submiſſion, upon pretence, that the Biſhops and Clergy had not done it; They, after the Biſhops Example, ſubſcribed a third ſeparate Submiſſion of all their Rights to other Mens Teinds.

22. The Commiſſioners of the Royal Burrows made a fourth Submiſſion, in Name of their ſeveral Burghs, of all their Rights to Teinds.

23. That the King might determine the Matters ſubmitted the more equally, and with

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the leſs Expenſe to the Subject; Warrand was given to the Commiſſion to appoint Sub-commiſſioners in each Presbytry, to be choſen by the Moderator and Brethren thereof, for trying the real worth of Lands in Stock and Teind, and the juſt and conſtant value of Teinds, where the ſame had been drawn by a Titular or Tackſman, not being Heretor for ſeven Years of fifteen preceeding the ſecond of *February* 1629. Before whom Actions were purſued at the Inſtance of the Heretors, or Procurator Fiſcal, in caſe of their neglect. Appeals from them were diſcuſs'd, and their Reports allowed or diſallowed, only by the Commiſſion. But Heretors having deponed upon the value of their Teinds before the Sub-commiſſion, were not bound to give their Oath again upon the matter before the Commiſſion. The Procedure of the Sub-commiſſioners (as that of the *Judices Pedanei* among the *Romans*) was regulated by a *Formula* of Injunctions. Five of 'em were a *Quorum*; they cou'd not admit Witneſſes not worth 100 Pound of free Gear; nor more than 10 for each Room; When either the Purſuer or Defender was to make uſe of the Tenent or Servant of his adverſe Party as a Witneſs, the Maſter was bound to produce him; In a conjunct Probation, they were to lay moſt weight upon the cleareſt Depoſitions, without reſpect to the Number; Depoſitions behov'd to be ſubſcrib'd by the plurality of the Sub-commiſſion, and the Clerk; Citations within the Presbytry were to be upon Ten Days, and with-

without it upon Twenty, and upon Sixty, if the Party was out of the Kingdom. Such as had Intereſt to compear before the Sub-commiſſion, were ſafe from perſonal Diligence, for Eight Days before, and as long after the Diet of their Compearance. Fourty Yeats payment of Rental Bolls was a ſtanding Rule, where no body oppos'd it. The Clerk and Procurator Fiſcals Wages were paid out of the Kings Annuity.

24. The King, after the Lights he got from the Proceedings of the Commiſſion and Subcommiſſion, being well and ripely adviſed in the Matters ſubmitted: Upon the 2. of *September* 1629. pronounc'd four diſtinct Decreets Arbitral. The Decreet upon the firſt and general Surrender modified 1000 in Satisfaction of each 100 Merks of Feu Duty, or 100 Merks worth of all other conſtant Rents of Superiority, not being naked Service of Vaſſals: Deducing off the ſaids Feu Duties and other conſtant Rent, the Blench Duties contained in the Infeftments of Erection, for which no Acknowledgment was to be paid. And theſe Feu Duties and other conſtant Rent to be retained by the Submitters, till his Majeſty make payment to them of the ſaid Sums; determined the Teind to be the fifth part of the conſtant Rent, where the ſame is valued joyntly, with the Stock, and that where theſe are ſet for diſtinct Duties, the Heretor ſhould get Deduction of a fifth part of the true Rent of his Teind; (hence called, *The Kings Eaſe*) and allowed the Teinds, when valued, to be bought

bought at Nine Years Purchaſe, where the Seller has the Heretable Right; and if but a Temporary one, the price to be rul'd by the Number of Years to run, or Quality of the Right. And referr'd to the Commiſſioners of Valuation to give down of the ordinary price to Heretors having already ſtanding Tacks or other Rights of their own Teinds, according to the Nature and Duration thereof. The Submitters, for making the thing effectual, were ordained to grant and ſubſcribe Rights to the Teinds of other Mens Lands belonging to them in favours of his Majeſty; but only to be lyable in Warrandice from Deeds done by themſelves, or their Predeceſſors whom they repreſented as Heirs; nor were they to warrand from their own Deeds in favours of any preſent Poſſeſſor of the Tiends, condeſcended on by them to the Kings Advocat, or the Commiſſion Clerk. The Submiſſion was not to prejudge the Surrenderers in the leaſt, as to any Action of Warrandice competent to them againſt their Authors; they allowing, in the firſt end thereof, what they ſhall receive by vertue of the Decreet Arbitral. The Deduction of a fifth part of what is proven to be the yearly value of the Teinds, when the Stock and they are ſeparatly ſet, is allowed for adjuſting the ſame to the conſtant Rent *Communibus Annis*: For the Popiſh Clergy had generally racked their Teind, that was ſet in Tack for valued Duty or Rental Bolls. (*a*)

(a) *Stair Inſtit: Lib:* 2: *Tit:* 8: § 14.

This

This Decreet narrates, that the King had a ſpecial Intereſt in the Tithes of Erected Benefices; and therefore a part of the price, or valued Dury, ſhould be apply'd to his Majeſties Uſe.

25. Upon the ſecond Surrender made by the Clergy, and the fourth for the Burrows; The King gave his Decreet in the ſame Terms with the former, in ſo far as concerned the *Quota*, without any mention of a price in order to buying. And the ſecond Decreet doth farther, make it unlawful to the Submitters and their Succeſſors in Office, to ſet Tacks, or make any other Diſpoſition of their Submitted Teinds, except for payment of the *Quota* determined in the Decreet; which ſhould be tranſmitted entire in quantity and quality to their Succeſſors, without any alteration or diminution.

26. The Decreet upon the third Submiſſion runs in the ſame ſtrain, with that pronounced upon the firſt general Submiſſion, as to the Quantity and Price of the Teind.

27. The ſeveral Clauſes in the above-mentioned Decreets concerning Church-Superiorities, and the valuing and buying of Teinds, with the relative Acts of Commiſſion, were Ratified in the Parliament 1633, where King *Charles* the firſt ſat in Perſon. That concerning the Superiorities by the 14 Act, and the others, touching the Rate and Price of Teinds by the 17 Act of that Parliament.

28. For making the Decreets Arbitral, and Acts of Parliament Ratifying the ſame Effectual;

tual ; a new Commiſſion was named, (a) to value and ſell Teinds in the Terms foreſaid, and to value Vicarage and Parſonage ſeparately, where they are diſtinct Benefices, with power to appoint Sub-Commiſſioners within Pariſhes, or Presbytries for valuation of Teinds ; to Rectify unequal Valuations, but not thoſe lawfully led againſt all Parties having Intereſt, and allowed by former Commiſſions upon pretence of enorm leſion, at the Inſtance of the Miniſter not being Titular, or of the King's Advocat for his Majeſties Annuity, except Colluſion is inſtructed betwixt the Titular and Heretor, or betwixt the Procurator-fiſcal and them ; and Valuations a Third down of the true Rent were to be interpret Colluſion, and the Diminution probable by the Parties Oath. The ſaid Commiſſion was likewiſe impowered to Modify Stipends for Miniſters out of the valued Teind Duty of their Pariſhes not under eight Chalders of Victual, or 800 *Merks*, except for juſt Reaſons ; to Divide, Unite, and Annex Pariſhes ; and to perfect the Act of Parliament, Annexing the Superiorities of Church-Lands to the Crown.

29. Beſides the Acts of Parliament and Commiſſion made in the year 1633, for the maintenance and proviſion of the Miniſtry ; and for preventing and ſettling of Differences betwixt Titulars, and others having Right to other Mens Teinds, and the He-

(a) *Act* 19. *Parl.* 1633.

retors

retors concerning the Leading and drawing of 'em: ſince that time diverſe others have been made to that ſame purpoſe. Albeit the Parliaments from the year 1640 to the 1661, were Reſcinded by the 14*th* and 9*th* *Acts*, *Parl.* 1. *Seſs.* 1. *Ch.* 2. And declared to have Acted without lawful Authority: yet their Decreets of Commiſſion for Plantation of Churches, to the incouraging of Miniſters were Ratified; and only made reduceable by the Commiſſion given in that Parliament upon Grounds of iniquity. (*a*) But from this Ratification, all Decreets of Valuation or Modification ſince the year 1637, to the prejudice of Biſhops, as to what they then poſſeſs'd were excepted. (*b*) For the 30 *Act Parl.* 1641, had Ordained all Biſhops Teinds, whether Parſonage or Vicarage, to be apply'd by the Commiſſion towards the maintenance of the Miniſtry, and of Univerſities, Schools and Colledges, and to other pious Uſes; and during the laſt *Presbyterian Government*, much of 'em was diſpos'd that way: All which Deeds and Grants were Reſcinded by the Act 1662, Reſtoring Biſhops. But now Prelacy being again ſuppreſt; the Biſhops Teinds are come in her Majeſties hands.

30. Heretors us'd ordinarly to be limited by former Commiſſions, to a certain time of two or three years for the buying of their

(a) *Acts* 9. *and* 61. *Ibid.* (b) *Act* 28, *Seſſ.* 3. *Ibid.*

Teinds

Teinds. (*a*) But the Commiſſion 1690, left them at Liberty in that Matter, (*b*) and was more indulgent to them in ſeveral other things, than any other former Commiſſion. By allowing all Teinds Indiſcriminately to be valued, except either thoſe poſſeſs'd by Miniſters for their Stipends; (*c*) Or ſuch as belong to her Majeſty by the aboliſhing of Prelacy, while they continue undiſponed; or Teinds appropriated to Colledges, Hoſpitals, or pious Uſes; or which have been once conſolidat in the Heretors perſon, who Feued out the Lands without, or reſerving the Teinds: None of which can be bought, but only valued. (*d*) Heretors injoyed this farther Priviledge by the foreſaid Commiſſion, That (whereas in former times, the Heretor durſt not move for a Sale of his Teinds, it being in the power of the Patron, Titular or Tackſman having Right to the Teinds, to defeat his Deſign by offering to allocat them for the Miniſters Proviſion) after a citation given in a Proceſs of Sale, no allocation could be made of the Purſuers Teinds ſolely, but only of his and the other Teinds in the Pariſh proportionally. But then the Teind of the Teind-Maſters own Land were not to be allocat, except in the caſe of Penury of Teind beſide. (*e*) when Heretors had obtained

(a) *Act* 17. *Parl.* 1633. *Act* 61. *Seſſ.* 1. *Act.* 28. *Seſſ.* 3. *Parl.* 1. *Act* 15. *Seſſ.* 3. *Parl.* 2. *Ch.* 2: *Act* 28. *Parl.* 1. *Ja.* 7. (b) *Act* 30. *Seſſ.* 2. *Parl. W. and M.* (c) *Ibid.* (d) *Act* 24. *Seſſ.* 4. *Parl. W. and M.* (e) *Ibid.*

this check to the Oppreſſion of Teind-Maſters: it was thought fit to ſecure againſt their Abuſe of the Priviledge of leading their own Teinds after a valuation commenc'd. Leſt Heretors might induſtriouſly enter Actions for Valuation, to get a Warrand for leading their Teinds, and thereafter not inſiſt, but ſuffer their Proceſs to ly over, to the great prejudice of thoſe who have Right to the Teinds: It was Ordained, that Warrands granted for leading Teinds upon pretence of depending Valuations, ſhould expire after a Proteſtation for not inſiſting is taken out by the Defender. (*a*)

31. The Commiſſion 1690 continued to ſit when King *William* was Dead, and even after Queen *Ann's* Acceſſion to the Throne. But when King *William's* Parliament was diſſolved, they demur'd to meet: as if their powers had expired therewith. Yet the Lords of Seſſion upon a Memorial given in to them by Mr. *John Buchan* Commiſſion-Clerk, found the ſaid Commiſſion to be ſtill in Force: Becauſe, 1. The laſt Words of the Act of Parliament Ordains it to continue till Recalled; which was never done. But on the contrary, the Commiſſioners did not only take the Oath of *Allegiance*, and ſubſcribe the *Aſſurance* in that Capacity, but alſo did ſit and Act under her Majeſties Government. Nor can the Commiſſion be underſtood to Fall by the Parliaments being Diſſolv'd: Since the De-

(a) *Ibid.*

ſign

ſign of it, was to Determine Matters in the Intervals of an Adjournment, or Diſſolution of Parliament. 2. Tho King *Charles* 2d died in *February* 1685, the Commiſſion then ſtanding, continued to ſit and Act as formerly, till a New One was named by the ſucceding Parliament, held by the D. of *Queensberry*. 3. The Commiſſion cannot be ſaid to expire, unleſs either the Act for it had been expreſly Temporary, or Reſcinded by a poſterior Statute, or the Work perfected for which the Commiſſion was erected: neither of which can be pretended. And it is hardly ſafe to limite an Act of Parliament, even as to its Indurance without a ſpecial Warrand of Parliament.

CHAP. IV.

By what Law Tithes are Due:

THE Method I deſign to purſue in clearing up the Myſterious Subject of Tithes, is, 1. To diſcuſs that more Learned than uſeful Queſtion, by what Law Tithes are due? 2. To explain the ſeveral kinds of Tithes. 3. The different Rights of Tithes, their Nature, and how they are acquired, and loſt. 4. The Burdens affecting Tithes. 5. How Rights of Tithes are made effectual by payment. 6. Becauſe Tithes are the common

Fond of Miniſters Proviſion; the Latter whereof is Modified and Allocat, and the former valued and ſold by Decreets of the Commiſſion; and points of Right from thence emerging are determined by the Lords of Seſſion: I ſhall firſt treat of Actions before the Commiſſion; and then handle ſuch as fall under the Cognizance of the Lords of Seſſion.

1. The Generality of the Canoniſts and Clergy, eſpecially the *Engliſh* Divines, are of Opinion, that Tithes, even as to the proportion of a *Tenth* part are due *de jure Divino*. To find the firſt *Inſtitution* whereof, they run back to *Adam*, pretending that the Law of Tithes was firſt given to him; and that *Abel* was an Honeſt Payer of Tithes, and *Cain* was not. They tell us that the Patriarchs, *Abraham* and *Jacob* payed Tithes by Revelation; the *Heathens* by Tradition, and the Light of Nature; and that the *Jews* had a written Command for it. They confeſs the Ceremonial part in Tithes under the Law, ſuch as the reſtraining them to one Tribe, and the Modes and Circumſtances of Tithing, being peculiar to the *Moſaick* Diſpenſation was Aboliſhed by CHRIST; but contend that Tithes are moral as to the *Quota*; and in ſo far eſtabliſhed and approved by our Saviour, and His Apoſtles. If we Object that the payment of Tithes is no where Commanded in the New *Teſtament*. The Anſwer given is, 1. That was for preventing all occaſion of Offence to the *Jews* whoſe Prieſts were then in poſſeſſion

of

of the Tithes ; and Matters were ſuffered a while to run in the old Channel, till the whole Jewiſh polity was decently buried. 2. Since the World knew there was a Divine Law for Tithes ; our LORD was only to declare who had Right to receive them : Nor was there any neceſſity to make a new Law about them, ſince Chriſtians in theſe days gave more than a Tenth freely. 3. The State of the Church then under Perſecution, wou'd not admit of a regular payment of Tithes. Farther ; for evincing this Divine Right of Tithes, there uſeth to be adduc'd a ſwarm of Citations and Authorities out of the Councils, and antient Fathers, beſides the Decrees of Popes, and Conſtitutions of Chriſtian Princes, particularly the Capitulars of *Charles* the Great, which are the Canons of Councils turn'd into civil Sanctions by the Stamp of Imperial Authority. Theſe *jure divino's* allow no Subſtraction in their Decimal Arithmetick; nay, cannot be reconcil'd to the compenſing of Tithes, by payment to the Clergy of a Stipend or any other equivalent: As if that were to be wiſer than GOD himſelf, who required Tithes in their kind, and not in Money ; that there might be the greater Sympathy betwixt Paſtor and People, by mutual partaking in times of Plenty, and ſuffering in Extremities. They pretend not only to give us a Reaſon why GOD, who requires a Seventh part of our Time, is content with leſs of our Subſtance ; for that ſome pains and Induſtry is beſtowed upon the one, and

not upon the other : But alſo aſſign myſtical and political Reaſons for devoting the Tenth, rather than any other proportion of our Goods. They diſcover ſtrange Myſteries in the Number *Ten*, and run out into the Mathemacal Powers of it, with a great deal of ſuch like Stuff too irkſom to repeat. To give this Opinion the deeper Impreſſion we are intertained with Stories of Perſons whom Divine Vengeance purſued for refuſing payment of their Tithes. Such as St. *Eucherius* Viſion concerning *Charles Martel*, the Tragical end of the *French Leutardus*, and the Tale of *Auguſtine* the Monk, with the Parſon of *Compton* in *Oxford* Shire. K. *Henry 8th* of *England* is brought for an Inſtance of one whom a Curſe followed in the Extinction of his Family, and the melting away of his Treaſure, for having meddled with the Tithes. Nay, ſome are pleas'd to remit us for a Leſſon herein to the very Brutes : For *Ælian* (*a*) Relates, ſay they, that ſome kind of Beaſts in *Africa* always divided their Prey in Eleven parts, and eat only Ten of 'em, reſerving the Eleventh as a kind of Tithe. Others are ſo high upon't, as to tell us that no Argument can be adduc'd againſt the Morality of Tithing ; but what wou'd militate or ſtrick againſt the Morality of the Sabbath. The time was when this Doctrine had ſuch effect upon many, and made them ſo nicely careful in payment of their Tithes, that at their Death in lieu of any

(a) *De Natura animalium L. 4. Cap. 53.*

Tithes

Tithes forgotten, they left ſome Legacy to the *Pariſh-Prieſt*, called *Soul-ſhot*.

2. A Learned Divine of our own Countrey, (*a*) has gone another and ſhorter way to Work, for maintaining the Churches pretenſion to the Tithes. Theſe having once been Devoted and ſet a part for Divine Service, ſays he, The taking them away, and the applying them to another uſe, is like what *Ananias* and *Sapphira* did with the Price of the Land.

3. The School-men who have ſtuft Divinity with Diſtinctions, and many other Divines and Lawyers of no ſmall Note, maintain that ſome part of our Goods is due by Divine Right toward the Maintenance of the Clergy; but that the *Proportion* may be Determined by Humane poſitive Law, according to the Circumſtances of Times and Perſons. This Opinion is calculated to our *Meridian*, and jumps with the Analogy of our Law. (*b*) Nor will it appear unreaſonable to any who conſider that the Prieſt-hood being chang'd, there is alſo a change of the Law. (*c*) Our Saviour having Inſtitute a New Form of Miniſtry, appointed alſo a New Way of providing Neceſſaries to His Miniſters; That is, only in the general terms of *They who preach the Goſpel ſhould live by the Goſpel*,

(a) *D. Forbes Theolog. Moral. part* 3. *Lib.* 8. *Cap:* 2. *N.* 13; (b) *Craig Feud. Lib.* 1. *Dieg.* 13. *Stair Inſtitut. Lib.* 2. *Tit.* 8. §. 4; *Mackenzie Inſtitut. lib.* 2. *Tit.* 10. (c) *Hebr.* 7. 12.

and

and they who Serve at the Altar, should participate of that which is offer'd upon the Altar. 2. *Abraham's* payment of Tithes to *Melchisedeck*, was partly a piece of Homage to him, as King of *Salem*; partly to Requite the seasonable Present of *Bread* and *Wine*, that *Melchisedeck* brought with him to Refresh *Abraham's* Army: and *Jacob's* Vow was a Free-will-Offering, not founded on any precedent Tie. The payment of Tithes by *Pagans* to their Heathen *deities*, was not the effect of any Natural Instinct; but only a Custom borrowed from the *Jews*. And as for the Law, concerning the payment of Tithes among the *Jews*, that was only calculate to their particular Constitution, being a *Theocracy*; where the share payed in other Nations to their King, was reserv'd by GOD in a Charter from Heaven to himself, and his immediate Officers, the *Priests* and *Levites*, who had not as our Churchmen the Charge of Souls, but were vastly more numerous, and *Judea* more fertile than our Land. 3. Tithes were clearly Ceremonial, not being given to the *Levites* till once they had been offer'd a *Heave-Offering* to the LORD. (*a*) And only upon the account of the *Levitical* and *Ceremonial* Service of the *Tabernacle*. (*b*) Which being now interrupted among the *Jews*, they themselves pay no Tithes, tho they have still *Rabbies* and *Doctors* of their Law, because they have no *Levites*, nor *Temple*, nor *Altar*. And then a farther consi-

(a) *Numb.* 18. 24, 28. (b) *Ibid. v.* 24, 28.

deration

deration for beſtowing of Tithes upon the *Prieſts* and *Levites*, that holds not in the caſe of a Goſpel-Miniſtry, was, for that they were excluded from all other part, and Inheritance in the Land. (*a*) Whereby they loſt a Twelfth of Property, for a Tenth of Annual Increaſe. 4. As for the private Reaſonings of *Origine*, *Ambroſe*, *Auguſtine*, and ſome others of the Fathers, they are of no Auhority, except in ſo far as they are founded in *Scripture Teſtimony*. Nor is it good Arguing with us to draw certain Concluſions as to the Right of Tithes, from Canons of the Church, or the Conſtitutions of particular Princes. For what hath a provincial Council of one Nation to do with another? or what Authority can the Imperials of the old *French* Empire have in *Scotland?* or what Force can there be in the Popes Decrees with us, who have ſhaken off the *Roman* Yoke, but in ſo far as they are twiſted with our own civil Law? Eſpecially ſeing by expreſs Statutes, This Kingdom is declared to be Subject only to the King's Laws;& to no Laws of other Counrries. (*b*) Moreover, we and many other Nations contradict the Canon Law in Cuſtoms and Practice, touching the Clergies maintenance; and without regard to it, have by municipal Statutes ſubjected Tithes to civil Titles. Few or no Tithes are payed to the Church in *Italy*. (*c*) Only in *Venice* they pay all their

(*a*) *Ibid. v.* 20, 24. (b) *Ja.* 1. *Parl* 3. *cap.* 48. *Ja.*4. *Parl. 6. cap.* 79. (c) *Sir Edward Sandys Europæ ſpeculum Edit. Hag. Com.* 1629. *pag.* 144. *Thomaſſin la Diſcipline del' Egliſe part* 4. *liv.* 3. *chap.* 1. *N.* 13.

perſonal

perſonal Tithes when at the point of Death. (*a*) As few Tithes are payed in *Spain*. (*b*) Where moſt of 'em are Feued to Laymen. We find no mention of Tithes in the *Ethiopick* Church. (*c*) Nor in the Eaſt Countrey. (*d*) The Northern Nations were not eaſily brought to pay Tithes. Particularly the *Danes* continued for a long time ſo averſe from it, that they betrayed and murder'd their Prince *Knout* 4*th*, for only going about to Impoſe the payment of Tithes. (*e*) And we had a Biſhop in *Orkney*, who was Sacrific'd to the Fury of a Mob for his Rigorous exaction of Tithes. The Book of Diſcipline alſo 1560, (*f*) Repreſents it as a thing moſt reaſonable that every one have the diſpoſal of his own Tithes, ſo be he give ſatisfaction to the Church of what ſhall be put upon him. 5. In moſt places where any thing hath been payed in name of Tithe, the *Quota* hath varied, and hath been ſometimes the Eighth, Twelvth, Twenty, Thirty, or any other part according to Municipal Cuſtoms. (*g*) So the *Locrians* to outdo their Enemies of *Crotona* did conſecrate the Ninth part of their booty to *Apollo*. (*h*) The *Egyptian* Prieſts had the Third part of the Revenue of that Kingdom. In *France* by the Laws of *Charles* the Great, and *Lewis*

(*a*) *Ibid.* (b) *Burnet Hiſt. of the Right of Princes, chap* 4. *p.* 141. (c) *Damian a Goes De Æthiopum moribus.* (d) *Thomaſſin. Ibid.* (e) *Crantz: Dania lib.* 4. *cap.* 37: *Meurſii Hiſt. Dan. lib.* 4. (f) *Head* 5. (g) *Rebuff de decimis qu.* 4. *Carpzov. Juriſpr. Conſtit. lib.* 1. *tit.* 8. *defin.* 125. *N.* 13. (h) *Juſtin. Hiſt. lib.* 20. *chap.* 3.

le debonnair

le debonnair two Tithes were payable, that is both a Ninth and a Tenth by the Laick Poſſeſſors of Eccleſiaſtick Beneſices. (*a*) In *Germany* they have a cuſtom of paying *Certas menſuras pro Decimis ſive Coloni aliquid collegerint ſive non.* (*b*) By the Laws of *Swedland* and *Gothland Decimarum Tertiam partem ſuſcipit Preſbyter, et de reliquis duabus partibus capit Eccleſia tertiam partem.* (*c*) And with us much Tithe is conſolidate with the Stock, called *Decimæ incluſæ*; and all other Tithe may be valued; and moſt of it may be bought. (*d*) The Divine Right of Tithes being ſufficiently confuted: I remit ſuch as deſire an Anſwer, to Doctor *Forbes*'s Argument for leaving them to the Church, to what is advanc'd, *Part* 1. *Chap.* 5. *N.* 25.

4. I ſaid, the Clergy according to the Schoolmen and others, have a Title by Divine Right to a Competency of our Goods for their Aliment; But if they be otherways ſufficiently provided for, as in Churches where Stipends are modified to Miniſters; they have no Divine Warrand to claim any thing by way of Tithe, ſince the Goſpel Reaſon ceaſeth. But tho I joyn with thoſe who think that the payment of Tithes may be reſtricted and qualified by particular Laws and Cuſtoms; I would not be underſtood to favour their Opinion, who hold Tithes to be mere Alms, and not due to the Miniſters of the Goſpel

(a) *Thomaſſin part* 3. *liv:* 3. *chap:* 2. *N.* 3. (b) *Selden Hiſt: of Tithes chap:* 7. *N.* 8. (c) *Ibid.* (d) *Act* 30. *Parl:* 1. *Seſſ:* 2. *W. and M. Act* 24. *Seſſ.* 4. *Ibid.*

by

by any Parochial-right; but that in case of his Malversation they may be dispos'd of by the Heretor at pleasure. For this is abundantly confuted by the Constitutions and Practice of these Christian States where Tithes have been variously settled, for maintenance of the Evangelical Priest-hood; and other pious Uses, by legal and civil Tithes, which imply a *Debitum Justitiæ*. So, Mr. *Milton* is justly censurable for asserting, (*a*) That the Churches Title to the Tithes, is no better than *Gehazi's* was to these things, which, by abusing his Masters Name, he took'd from *Naaman*. Which Expression must be considered only as an Extravagant Flight of an over-heated satyrical vein.

(a) *Consid: for removing Hirelings out of the Church.*

CHAP. V.

The several kinds of Tithes Explained.

TITHES have been variously divided by these who have handled this Subject, according to the different views they had of it. But I think for distinctions sake, they may be divided into Tithes under the Law, and Tithes under the Gospel.

2. Under the Law, besides the first Fruits, a Tenth was paid to the Levites, and the Tithe of that to the Priests, called *Decima Decimarum*,

cimarum, or the Tithe of the Tithe. A ſecond Tithe was taken out of the Peoples nine parts, and ſpent the firſt two Years at the Temple in Feaſts; not unlike the *Agapæ* of the Primitive Chriſtians. The Rabbins make alſo mention of the poor Mans Tithe, which every third Year was to be beſtowed at home within their own Gates upon the poor and Levites. But whether that was in place of the Tithe for Feaſts, as Mr. *Selden* thinks, or, according to the Opinion of others, a third extraordinary Tithe diſtinct from both the Levites Tithe and it; they're wiſer than I can tell.

3. Tithes under the Goſpel may be conſider'd not improperly under the Notion of ordinary and extraordinary Tithes. The latter were an improper kind of Tithes impos'd by the Pope *pro re natâ* to ſerve a turn of ſome publick Exigence of Church or State; as for carrying on a Holy War againſt Infidels or Hereticks. Such were the *Decimæ Papales*, and the *Decimæ Saladinæ*. Some Grants of Tithes of this kind in favours of our Kings are extant in *Fordons* Hiſtory. I find mention in ſome of our old Papers of *Second Tithes*; and theſe I think may not improperly be brought under the Denomination of extraordinary Tithes. The Biſhops of *Aberdeen* were infeft in the ſecond Tithes of all Caſualities of Ward and Relief of Lands holden of the King within the Shires of *Aberdeen* and *Bamff*; and the raiſing thereof being uneaſy and troubleſom, B. *William Elphinſtoun* obtained from King *James* 4. an equivalent Compenſation for the ſame

out

out of the Rents of the neareſt, and moſt contiguous of theſe Lands during the Ward. The Biſhop of *Brechin* alſo got Right in the Year 1412 to the ſecond Tithes of the Kings Caſualities of Ward, Relief, Marriage, Fines, Eſcheats, and Unlaws of Juſtice Courts, Chamberlain and Sheriff Courts, in the Shire of *Kincardin*, &c.

4. Ordinary and proper Tithes are divided either with reſpect to the Subject Tithable, or the perſons payable to. Tithes with reſpect to the Subject Tithable are commonly divided into Perſonal, Predial, and mixt Tithes.

5. Perſonal Tithes ariſe out of a Mans free Gain by his Trade or perſonal Induſtry; Expenſes being firſt deduced: And are due at the Years end to the Pariſh Church where the perſon lives, and partakes of the Divine Ordinances. (*a*) But at *Venice* they have a cuſtom of paying their perſonal Tithes once for all *in Articulo Mortis*. (*b*) *Charles* the Great is the firſt whom I obſerve to have appointed by a publick Law, (*c*) That all perſons ſhould pay the Tithe of their Labour, now called, *The Perſonal Tithe*. It were vain for me to trace the Canoniſts in their Subtilizing, when they tell us, that he who has Houſes in ſeveral Pariſhes, and reſide ſometimes in one and ſometimes in another, muſt pay the perſonal Tithe

(a) *Zoeſ: in Decretal: Lib:* 3: *Tit:* 30: *Cap:* 1: *N:* 12: *Cap:* 3: *N:* 63. *Caniſ: de Decimis, Cap:* 2: *N:* 2. (b) *Rebuff: de Decimis, Q:* 13: *N:* 52: *A: Monet: Breviar: cum Auct: de Decim: Cap.* 7: *P:* 478. (c) *Anno* 789: *C:* 17.

where

where his principal Dwelling is: (*a*) And that if upon the Confines of two Pariſhes, he pays a perſonal Tithe to each of 'em. (*b*) And if it be doubtful what Pariſh the Parties Houſe belongs to, the Situation of the Door determines the matter. (*c*) And where there are two Doors, that is conſidered as the Pariſh where the principal or Fore-Door is fix'd. (*d*) I ſay it were ſo much Labour thrown away, to inſiſt and dwell upon theſe or the like unprofitable Niceties, which ſwell the Writings of the Doctors. Eſpecially ſince perſonal Tithes take no place in our Cuſtom. (*e*) And more than that have every where gone into Deſuetude. (*f*) But yet 40 Years payment to the Vicar of a certain Duty by Weavers out of each Loom in the Pariſh, tho a kind of perſonal Tithe was ſuſtained to make them liable for the ſame in all time thereafter. (*g*)

6. Real or Predial Tithes are ſuch as are payable out of the natural Fruits or Product of the Ground or Water. (*h*) Of this kind are the Tithes of Corn, Wine, Fiſh, and living Creatures, *&c.* which are due *perceptis ſtatim Fructibus* to the Pariſh Church where the Fruits are gathered; and that off the

(a) *Rebuff: Ibid: Q:* 6: *N:* 2: *Monet: Ibid: Cap:* 5: *P:* 282 (b) *Ibid: Rebuff: Ibid: N:* 3. (c) *Ibid: N:* 4. (d) *Ibid: N:* 5: *Arg: l:* 44: *ff: de Religioſ: & l:* 10: *ff. de Statu Hominum.* (e) *Stair Inſtit: Lib:* 2: *Tit:* 8: § 6: (*f*) *Carpzov. Juriſpr: Conſiſt: Lib:* 1: *Tit:* 8: *Def:* 131: *N:* 3: *Camſ: de Decim: Cap:* 2: *N:* 3. (g) *November* 29: 1678: *Birnie contra E: of Nithſdale and his Tenents.* (h) *Stair Inſtit: Lib:* 2; *Tit:* 8; § 5.

whole

whole Head, without any Conſideration or Allowance of the Expenſes of Reaping or Cultivating. (*a*) Altho this would ſeem ſcarce conſiſtent with theſe Principles of Law, *Non intelliguntur Fructus niſi deductis Expenſis.* (*b*) *Nec Lucrum intelligitur niſi omni Damno deducto.* (*c*) The Reaſon pretended by the Canoniſts, why, as to the Deduction of Expenſes, it is otherwiſe in Perſonal than in Predial Tithes; is, becauſe GOD Almighty, in the Old Teſtament, reſerved to himſelf the one, and not the other. (*d*)

7. As for mixt Tithes, the third Member of the common Diviſion, by which they mean ſuch as are payable out of the Induſtrial Profits of Lands, there ſeems to be no neceſſity of admitting the ſame as contradiſtinct to the other two. For I find no Ground for it in the Canon Law, which (*e*) only mentions two ſorts of Tithes, Predial and Perſonal. And if the Concurrence of perſonal Induſtry towards the production of Tithable Fruits did afford the Denomination of mixt Tithes; then all Predial Tithes would be ſuch. For removing all Ambiguity of this nature, theſe ought properly to be termed perſonal Tithes, that ariſe from what is gained meerly by per-

(a) *C: cum Homines 7: Extr: de Decimis: Caniſ: de Decim: Cap: 2: N: 2: Cap: 7: N· 1: Rebuff: Q: 11: N: 3: Zoeſ: in Decretal: Lib: 3: Tit: 30: Cap: 1: N: 12.* (b) *l: 36: § ult: ff: de Petit: Hæredit: l: 7: princip: ff: Soluto Matrimonio.* (c) *l: 30: ff: pro Socio.* (d) *Caniſ: Ibid: N: 3: Barboſ: de Offic: & Poteſt: Parochi, Cap: 28: § 1: N: 37: & 38.* (e) *C: 20: Extr: de Decimis & elſewhere.*

ſonal

ſonal Induſtry; and all others ſhould go under the name of predial or real Tithes, that humane pains or induſtry doth but partly concur to make way for. (a)

8. Tithes, with reſpect to the perſons payable to, are divided into Parſonage and Vicarage Tithes. For underſtanding this Diſtinction, it is fit to notice, that the Teind due to the Pariſh Miniſter was at firſt only the Tithe of growing Corn. But when Pariſh Churches fell to be annex'd and appropriated by Mortifications, or otherwiſe, to Cathedral and Collegiate Churches and Monaſtries, and plurality of Benefices came in play; the Cure of theſe Churches came to be ſupplied by Vicar-Incumbents. Whoſe Stipends, in the beginning, were nothing but what the Parſons were pleas'd to give. But that proving very inconſiderable, a new method was fallen upon to ſet off the Tithes of the Annual Increaſe, Corn excepted, for the Vicars better proviſion. Hence aroſe the Difference betwixt Parſonage and Vicarage Tithes. Under Parſonage Tithes, called *Decimæ Garbales*, or Teind Sheaves, or the great Teind, I comprehend only the Tithe of Corn. Becauſe the true Characteriſtick of Parſonage is, that it was introduc'd by poſitive Law, and is the ſame in all places, liable to no Alteration or Extinction by Preſcription or long Cuſtom. Whereas it can be made appear by Deciſions not a few, (b) That all other

(a) *A: Monet: Ibid: P:* 169: *Barboſ: Collect: Doctor: in Lib:* 3: *Decretal: Tit;* 30: *pr; N;* 11. (b) *Vid: inf: Chap:* 6: *Sect:* 5.

Teindable Subjects in *Scotland* have been found to be local: And either introduc'd, or modified or taken off by Prescription. It is confess'd, that Tithes of another kind than Corn have been sometimes paid to Parsons and to Bishops. But these were not payed to them *qua* Parsons, but as having the Title of Vicars consolidate in their person. For as in some places there never was any Vicar: So in others there was, but the Parsonage and Vicarage are now swallowed up in one Titular. If it be objected, that since two Acts of Parliament were made, for obliging each Man having a Plough of Eight Oxen to Sow at least a Firlot of Wheat, half a Firlot of Pease, and 40 Beans yearly, under the pains of Ten Shilling: (*a*) It would seem, that Corn in those days could not be considered as the Subject of the great Teind, there being so little Sowing. My Answer is, That these Acts do not argue a Scarcity of Corn, but only of some particular Grains; for not Sowing whereof, even at this day, some Country People have their own political Reasons. Parsonage then is the Tithe of Corn, which is due to the Parson. Parsons are they who possess Parochial Benefices by their own immediate Right, whereas the Vicars Title is deriv'd from another. Parsons again are either such as we properly call so, for performing the Sacred Function themselves, the predial Tithes of whose Parish are not appropriate to any other Benefice, but in

(a) *Ja:* 1: *Parl:* 5: *Cap:* 81; *J:* 2: *Parl:* 14: *C:* 81.

their

their own poſſeſſion; or Repreſentative Parſons, if I may ſpeak ſo, who ſupply the Cure by the help of Vicars. Of this latter kind are the Prelates of Churches and Monaſtries: So called from the reſpect and preference they get in their Chapters and Convents.

9. Vicarage, or the ſmall Tithe which belongs to the Vicar, came in by no poſitive Law, but only by Cuſtom: (*a*) And by Cuſtom it is modified, and taken off. The Reaſon has been, becauſe Vicars at firſt called ſimple Stipendiary Vicars, were only put in for a time to ſerve the Cure during the Parſons pleaſure; and frequently upon the account of his Infirmity, and perhaps Lazineſs: So that when the parſon found himſelf in a Condition or Humour to officiat, the Vicar was remov'd, and the Stipend expir'd with his Service. But at length, *ob majus bonum Eccleſiæ*, perpetual Vicars were ſettled with *Curâ Animarum*. In Pariſhes, according as all or moſt of the Increaſe was Corn, the Vicarage was intirely or partly founded in Teind Sheaves. In thoſe where the paſture Ground was more conſiderable, the Vicarage was the Teind of the product thereof. And as that differ'd in different places: So it afforded a different Vicarage Tithe. In ſome Pariſhes no Vicarage is paid, as where moſt of the Land is laboured, and the proper Subject of Vicarage inconſiderable. In many parts the Tithe of Eggs, Fruit, Lint and Hemp is paid. The Vicarage

(*a*) *Epeiſſes des Benefices Eccleſiaſt: Tit: 19; Sect: 3; N: 6.*

of Salt and a perſonal Teind Duty for every Loom in the Pariſh was ſuſtained upon 40 Years poſſeſſion. (*a*) Yea, in different places of the ſame Pariſh there was found Diverſity of Vicarage. In ſome Lands thereof the Tithe of Lamb and Wool was paid; in others Hay, Cheeſe and Geeſe was the Vicarage, and in no part of it any Vicarage of Cows. (*b*) In ſome Pariſhes again, and not in others, the Tithe-Fiſh is claim'd as Vicarage.

10. *Hope* in his larger Practicks divides Teinds into Civil, and Eccleſiaſtick. By the latter he means ſuch as the Parſon or Vicar may lay Claim to, and by the former the Kings Teind of Minerals, and thoſe Teinds that are Feued with the Stock, now called *Decimæ Incluſæ*.

11. The common Tax formerly paid to the *French* King in old time, as the Learned B. of *Sarum* (*c*) obſerves, was the Tenth Part, which came to be called the *Ninths* after the Church had the Tithes. (*d*) The ſame Cuſtom was alſo receiv'd in *Germany* and other places. It was the Share which the *Roman* Emperors reſerv'd out of Mines. (*e*) And *Samuel*, (*f*) when he is expoſing the Severities of Monarchy, inſinuates, that this was alſo the Claim of the Kings of the Eaſt.

12. *Decimæ Incluſæ* are Teinds which have been always within the Memory of Man Feu-

(a) *November* 29: 1678: *Birnie contra E: of Nithſdale:* (b) *July* 7: 1677: *Parſon of Preſtonhaugh contra his Pariſhioners.* (c) *Hiſt: of the Rights of Princes, Chap:* 4. (d) *Mezeray Hiſt.* (e) *l:* 3: *Cod: de Metall.* (f) 1 *Samuel* 8: 15, 16.

ed

ed promiſcuouſly with the Stock for a joint Duty, and differ from ordinary Teinds in many Priviledges and Specialities. (*a*) Our *Decimæ Incluſæ* are much the ſame with the *Decimæ Infeudatæ* in the Canon Law. But all *Decimæ Infeudatæ* are not eſteem'd *Incluſæ* with us. For theſe are in the common caſe of other Teinds, if it can be proven, that the Stock and they were once diſtinct and ſeparate. So in a caſe betwixt *Monimusk* and *Pitfoddels*. (*b*) Teinds tranſmitted by Infeftment under the Deſignation of *Decimæ Incluſæ*, were found not to have the Priviledge of ſuch; in regard diſtinct *Reddendo's* were paid for Stock and Teind: Altho a different Duty happens frequently to be paid in Lands of the ſame Holding.

13. There is another kind of Tithes which are now priviledg'd with us, that they cannot be bought or ſold, *viz.* Thoſe that were once in the perſon of the Heretor, and reſerv'd by him, when he Feued out his Lands. (*c*)

(a) *Vid: inf: Chap: 6: pr.* (b) *July* 13: 1678. (c) *W: & M: Parl: Seſſ:* 4: *C:* 24.

CHAP. VI.

Of the different Rights of Tithes; their Nature, and how they are acquired, and extinguished.

THE Council of *Lateran* held under Pope *Alexander* 3 in the Year 1179 discharged the Feuing out of Tithes in these Terms, *Prohibemus ne Laici Decimas cum Animarum suarum periculo detinentes; in alios Laicos possint aliquo modo transferre. Si quis vero receperit, & Ecclesiæ non reddiderit, Christianâ Sepultura privetur.* Canonists differ in explaining this Law. Some would have the meaning to be, that Tithes, tho acquired before that Council, are not afterwards to be transmitted from one Layman to another. As if the Canon were only Declaratory of a Laicks utter Incapacity of enjoying Tithes at any time. (*a*) Sir *G. Mackenzie* takes it also in this Sense. (*b*) And therefor wonders, why our Custom restricts the Effect of the Canonical Sanction to Infeudations since the *Lateran* Council; thinking the Mistake lay in concluding that because Laicks, by that Decree, were declared incapable of Feudal Tithes, therefore they

(a) *Rebuff. de Decimis, Q:* 10: *N:* 23: *Barbos: in C: cum Apostolic:* 7: *N:* 5. (b) *Observ: on the* 29: *Act,* 11: *Parl: J:* 6.

were

were capable of 'em before. Others more probably think it imports only a Prohibition to grant new Feus of Tithes in favours of Laicks, without prejudice to former Infeudations: And that the Insinuation in the Canon concerning Laymens possessing Tithes before, with the Danger of their Souls, is only to be understood either of such as had made themselves Masters of Tithes without any Shadow of Title; or did not pay their Feu Duty to the Church. (*a*) And this Opinion is suted to the Analogy of our Law. A third sort labour to amuse us with a Reconciling Distinction of *Jus Percipiendi*, and *Fructus Decimarum*; as if the latter, and not the former, might lawfully pass into Lay Hands. But the Learned *Thomassin* (*b*) seems to be *Non Liquet* in the Matter. *Craig* (*c*) thinks the Distinction useless as to us, who have no Feus of Tithes extant of a Date anterior to the *Lateran* Council. From which time, our Law never allowed the Feuing of Tithes, till that Rational Innovation introduced by King *Charles* the First: Neither would Immemorial Possession of them as Feudal have made a valid Right.

2. But sometimes the Churchmen being Proprietars of both Stock and Teind, Feued them out together for a joint Duty. And these we call *Decimæ Inclusæ*, which none can instruct to have been ever separated from the

(*a*) *Covarruv. Varior. Resol. Lib.* 1. *Cap.* 17. *N.* 5. *vers. olim sanè Caniz. de Decim. Cap.* 13. *N.* 5. *Selden Hist. of Tithes, Cha.* 6. *N.* 4. *Chap.* 7. *N.* 2. (*b*) *La Discipline del'Eglise, Part.* 1. *Liv.* 3. *Chap.* 3. *N.* 7. (*c*) *Feud. Lib.* 1. *Dieg.* 13.

Stock.

Stock. Such was the Priviledge of *Decimæ Inclusæ*, that the King himself could not grant new Charters effectually, with that Clause. (*a*) They were in so far considered as no Teinds, that a Clause in a Charter *cum Decimis Inclusis* was thought to imply, that Laicks might prescribe a Right to these included Tithes: They could not be valued, nor subjected to any legal Burden of Ministers Stipend, or the like; tho there was not Sufficiency of other Teinds in the Parish. But in regard the 29. *Act*, 11. *Parl. Ja.* 6. ordains, that where Stock and Teind are Feued together for a common Duty, Nine Parts thereof belong to the King as Temporality, and the Tenth to the Church as Spirituality, in Contemplation of the Teind: It was found, (*b*) That an Heretor, notwithstanding his Right *cum Decimis Inclusis*, should be liable to the Minister for the Tenth Part of the Feu Duty, and have Relief against the Titular *pro tanto*. And yet if a Fieu were granted of Lands and Teinds for payment of a certain Duty, and the Titular or Ecclesiastick having Right to the Superiority should dispone the same, or Nine Parts of the Feu Duty, reserving the Tenth to himself; that Tenth could never be understood as Teind so as to be liable to a Stipend, more than the other Nine Parts.

3. Since the Surrender and the Royal Decreets Arbitral, Tithes generally pass in ne

(a) *Stair Instit. Lib.* 2. *Tit.* 8. § 10. (b) *March* 184. *Heretors of Tulliallan against Colvil.*

same

ſame manner as the Stock by Infeftment. And that either to Univerſal or Singular Succeſſors. Tithes are in Non-entry, as well as Lands from the Death of the Perſon laſt Veſt and Seaſed in the Heretable Right of 'em, till his Heir be entered. But ſince they were never Retoured, the Non-entry Duty, in the Opinion of Sir *Ja. Stuart*, (*a*) ſhould be the Feu Duty, where the Holding is Feu, and the Fifth of the Retour of the Property, if it be Blench. The Entry of Heirs is expede by Precepts of *Clare Conſtat*, or by Service upon Brieves out of the Chancellary. And tho theſe Brieves bear only a Warrand to enquire, *de quibus Terris & Annuis Reditibus* the Defunct died *Veſtitus*; yet an Heir, by vertue thereof, may be ſpecially Serv'd to one in Tithes: For the Terms of the Brieve are not to be ſo ſtrictly and captiouſly obſerv'd. (*b*)

4. For underſtanding how Rights of Tithes are tranſmitted to Singular Succeſſors; I ſhall divide them into Legal, and Conventional Rights. Under the former I comprehend, 1. That Right of Tithes, which, by the common Law, belongs to the Pariſh Miniſter. 2. Thoſe Tithes given to Patrons in lieu of their aboliſhed Right of Preſentation. Conventional Rights are either Heretable and Abſolute, or Temporary. The latter are conſtitute by Tacks, the other by Diſpoſition or Adjudication: And both by Poſſeſſion. Of the Members of which Diviſion and Sub-Di-

(a) *Notes upon Dirletons Doubts, Title Teinds.* (b) *Ibid.*

viſion,

viſion, we ſhall treat in ſo many diſtinct Sections.

SECTION I.

What Right of Tithes is competent to the Pariſh Miniſter?

WE are Commanded to Honour the LORD with our Subſtance. (*a*) And ſince He in whom all Fulneſs dwells, ſtandeth not in need of our Goodneſs Himſelf, (*b*) thoſe His more immediate Servants, who ſerve at the *Altar*, and preach the Goſpel, are declar'd as His Receivers, to have Right to ſome part of our Temporal Things, in order to their Maintenance. (*c*) For this End and Uſe the Tithe hath generally been ſet a part. And that the Diſtribution might be more equal: It was found convenient to appropriat to each Miniſter, the Tithes of his own Pariſh. Which was confirm'd in that Provincial Council held in *Scotland* in the year 1225, (*d*) under Pope *Honorius* the 3*d*. (*e*) By this Method the greater portion of Tithes fell juſtly to his ſhare, who had the wider Pariſh, and conſequently the more weighty Charge.

(a) *Prov.* 3. 9. (b) *Pſalm* 16. 2. (c) 1 *Corinth:* 9. 11, 12, 13, 14. (d) *Cap.* 35. (e) *Vide Supra cap:* 3: *Pr: Num:* 3*d.*

2. Thus,

2. Thus, the Pariſh Miniſter came to have a preſumptive Right, by the common Law, to all the Tithes within his Pariſh, (*a*) Even to the Tithes of *Novalia*. (*b*) Which Tithe was in a manner Ratified by the 102 *Act*, *Parl.* 7. *Ja.* 6. Ordaining all Benefices under Prelacies, to be provided only in favours of actual Miniſters. So that the *Parochus qua* Miniſter might have effectually purſued payment, without any farther inſtruction; unleſs a better Title were produced by one compearing for his Intereſt. (*c*) I don't diſtinguiſh with ſome, betwixt the *jus percipiendi*, and the *Perceptio fructuum*: For the firſt would become an empty and an eluſory Right in the *Parochus*, if to his prejudice, and without his conſent, the preſent Fruits of the Teinds could be ſafely poſſeſs'd by others. The Doctors carry this Preſumption of the *Parochus*, having Right to the Tithes within his own Diſtrict, ſo far, that if another were Diſpoſſeſs'd of 'em by him, they don't allow the Party to be ſummarly Reſtored according to the Brocard *Spóliatus ante omnia reſtituendus*; unleſs he juſtify his former Poſſeſſion by proving that he had then a good Right in his perſon. (*d*) And although ordinarly the King's Gift be ſufficient againſt any that ſhew

(a) *C. cum contingat* 29. *C. quoniam* 13. *X. de Decimis Bruneman, de jure Eccleſiaſtico lib.* 2. *cap.* 6. *n.* 11. (b) *Ibid n.* 9. *Caniſ. de decimis cap.* 11. *n* 2. (c) *Rebuff. de congrua portione n.* 10. *& ſequ. Barboſ. de Offic. & poteſt. Paroch. cap.* 28. §. 2. *n.* 8, *&* 9. (d) *Ibid. n.* 43. *& ſeqq. Covarr. var. Reſol. lib.* 1. *cap.* 17. *n.* 6.

not

not a better Title; his Majesty being the common Author and Fountain of Rights: yet the same in Favours of one of the *Prebends* of the *Chappel-Royal*, and a Decreet conform, with Collation and Institution, was not sustained to carry the Right of Teinds from the Ministers Tacksman, although he produced no other Title but his Tack; unless either a Mortification of these Teinds to the *Chappel-Royal*, or Possession were instructed. (*a*) Vicarage Teinds as well as Parsonage, *de jure communi debentur Parocho*, unless Prescription of Freedom be proven, or a better Right in some other made appear, without necessity upon the Minister to Instruct Possession, but only his presentation and admission to that Church, with a Decreet conform. (*b*) And presentation to a Church which is a Parsonage, doth intitle the Minister to the Teinds, though not presented to be Rector or Parson. So a presentation to a Church that was a *Prebendrie* of the Collegiat Church of *Dumbar*, and to the Teinds thereof, was sustain'd to give the Minister the same Right, as if he had been expresly presented to be *Prebendary*. (*c*) But this presumptive Title of the Minister, was Excluded by a clear Right to the Teinds in the Heretors own Person. (*d*)

(a) *June* 27. 1665. *Ferguson contra Stuart of Ascog.* (b) *January* 14. 1674 *Johnstoun contra Stuart.* (c) *Dirleton Decis.* 112. *Dalzell contra* November 26. 1667. (d) *February* 4. 1681. *Robertson contra Arbuthnet of Carngall.*

3. It

3. It appears from what hath been ſaid, that regularly all Teinds belong'd to the Incumbent. Who if a Parſon, had Right to the Parſonage-Teind, and to the Vicarage if a Vicar: unleſs he was Limited by a Decreet of Modification or Locality; or that another could ſhew a better Right. Yea, Diſcharges to an Heretor of his Tithes by the Miniſter who was once Titular, after he was turn'd a *Stipendiary*, was ſuſtained for an Exoneration to the Heretor as to the years payed; and only to make him lyable to the Tackſman, for other years conform to that uſe of payment, till Citation or Inhibition. (*a*) But uſe of payment to a Miniſter, having Right by Aſſignation to the whole Parſonage-Teinds of a Barony, relative and conform to a Decreet of Locality, wherein three Chalders of Victual only was appointed to be payed to him furth thereof, did not Defend the Heretor from being lyable in payment of the Superplus-Teind to the true Titular. (*b*)

4. *Perſona & Vicarius* were not *Nomina juris* here, before King *David's* Reign, as hath been already Obſerved. (*c*) But at length our Law came to acknowledge the *Parochial* Right of Tithes ſo far, that it was made a Crime to take Tacks of them from others than the Parſon, or Vicar, or their Farmers. (*d*) But now the *Parochial* Right is reſolv'd

(a) 19. *January* 1669. *E. of Athol contra Robertſon of Strowan.* (b) 24. *November* 1699. *Sir William Bruce againſt Sir David Arnot.* (c) *Chap.* 3. *Fr. n.* 3. (d) *Act* 7: *Parl.* 2. *Ja.* 4.

into

into a naked Power of retaining Poſſeſſion of the Benefice, till the Patron obtain a juſt Stipend legally ſettl'd upon him. (*a*) Which carries me to the other Legal Right of Tithes lately granted in Favours of Patrons.

(a) *Act* 23. *Seſſ.* 2. *Par. W. and M.*

SECT. II.

What Right to Tithes is competent to Patrons?

THE Powers and Priviledges of Patron were formerly very Conſiderable: he had the Diſpoſal of the Fruits of the vacant Benefice; and the Preſentation of Incumbents, whoſe Deeds of Importance relating to the Benefice, were not Legal without his Conſent. Theſe ordinarly at their Entry uſed to convey their *Parochial* Right of the Tithes by way of Tack to the Patron for modifyed Stipends far within the Value: and what Remained over the modifyed Stipend, was ſo much clear Gain to him.

2. But now Preſentations are Reſcinded, in lieu whereof Patrons have got Right by Law, to all the Teinds of their Benefices, not Heretably Diſponed, with the burden of Tacks, and the ordinary Impoſitions for Miniſters Proviſions and Augmentations; even of Maintenance to two Miniſters in one Pa-

riſh

riſh, if the Commiſſion pleaſe: and Redeemable by the Heretors at ſix years Purchaſe after Valuation. But the Miniſter benefic'd is not to be Diſpoſſeſs'd until the Patron obtain a juſt Stipend legally ſettled upon him. (*a*) So that the old Brocard *Decimæ debentur Parocho*, is in a manner inverted to the Tune of *Decimæ debentur Patrono*. By the Act of Parliament 1593, (*b*) Gifts of Patronage from the King, without Conſent of the Benefic'd Perſon, are Declar'd Null. But now by the Acts of Parliament 1690, and 1693, all Miniſters are made Stipendaries, and the Teinds of the Benefice expreſly ſtated in the Patron; with the burden of a Stipend to the Miniſter. Who though once a Titular is allowed, but a *jus retentionis et hypothecæ*, till Redeemd by the Patron; Not unlike the Lords of Erection their Title to the Feu-duties. For as theſe cannot of themſelves purſue Reduction of their Vaſſals Feus: So Proceſs was not ſuſtain'd at the Inſtance of a *Quondam* Parſon for reducing the Kings Gift of Patronage upon the Act 1593, as being Null for want of his the Incumbents conſent. (*c*) The Miniſter of *Hounam* being provided by a Decreet of Locality with a Stipend, partly out of the Parſonage, and partly out of the Vicarage-Tithes of his Pariſh; and Sir *John Scot* of *Ancrum* having purſued a Valuation of the Vicarage a-

(a) *Act* 23: *Seſſ*: 2. *Junct Act* 26: *Seſſ*: 4: *Parl*: *W and M*: (b) *Act* 172: *Par*: 13: *Ja*: 6. (c) *The Miniſter of Aſkirk againſt Sir Gilbert Eliot.*

gainſt

gainſt Sir *Walter Riddel* of that Ilk, and the other Heretors, to the Effect he as Patron might have the Excreſce, after deduction of what was payed to the Miniſter: The Lords of Commiſſion found that he was not in the caſe of the Act of Parliament. Since the Miniſters whole Stipend was not payable out of the Vicarage-Teinds, and they were not ſufficient to make it up. Teind fiſh taken in *alto mari* were found Valuable, and lyable to be ſold at the Inſtance of the Heretor of the Ground where the Boats landed, againſt the Patron of the Pariſh, who laid Claim to them by vertue of the ſaid late Act. (*a*) For the Patrons Right to the Teinds, and the Heretors Right to buy them at ſix years Purchaſe, are reciprocal, and of the like extent. A Diſpoſition by a Patron to an Heretor of a Tack of his own Tithes, with all other Right he had thereto, or might have at any time thereafter; was found to carry, not only Tacks of Tithes and conventional Rights, but alſo the Benefite of the Supervenient Act of Parliament 1690. (*b*) In the caſe of Lands altogether Diſmembred from one Pariſh, and Annex'd to another; the Patron of the latter will no doubt have Right to the free Tithes of the Lands Annex'd. But if the Annexation be only *quoad curam animarum*; and the

(a) 22 *July* 1702, *Sir James Hall of Dunglaſs againſt the Moderator of the Presbytrie of Dumbar, Lord Alexander Hay, &c.*
(b) 3: *December* 1698. *Laird of Allardyce againſt the Viſcount of Arbuthnet.*

Heretors

Heretors of the Annex'd Lands continue to pay Stipend out of their Tithes, to the Miniſter of the former Pariſh : It would ſeem that the Patron thereof may pretend to the Superplus-Tithes of the Diſmembred Lands.

SECT. III.

Of Heretable and Abſolute Rights of Tithes.

TITHES, although they be diſtinct Rights from Lands, are either alienated expreſly ; or tacitely by Preſumptions and Inferences. Teinds are tacitely alienated and conveyed under a Wifes proviſion to the Terce of all Lands and Heretages. (*a*) But a Husband having Obliged himſelf to Infeft his Wife in all Lands and Heretages Conqueſt during the Marriage ; her Right was found not to Extend to Lands and Teinds, whereof the Husband purchaſed an Abſolute and Heretable Right, two years after he had acquired Tacks of the ſame *ſtante Matrimonio* : Except in ſo far as the yearly Profite by the Heretable Right exceeded that of the Tack. (*b*) Teinds were found to be carried by a Diſpoſition of Lands, not mentioning the Teinds ; becauſe it contained an Aſſignation to the

(a) 13: *February* 1628: *Lady Dumfermling contra the Earl her Son.* (b) 12: *March* 1628: *Inter Eoſdem.*

Tenents Tacks, which bore a Joint-duty for Stock and Teind, and an Obligement to pay the Miniſters Stipend out of the Teind. (a) A Buyer or Compriſer from one having Right to Lands *cum decimis incluſis*, will have Right to the Teinds, though not expreſly mentioned in the Diſpoſition or Compryſing: But this would not hold in the caſe of common Teinds. For although Servitudes and Rights of Annualrent, and other Burdens upon Lands are Extinguiſhed *confuſione* or *conſolidatione*, as ſoon as they come in the perſon of the Heretor: Yet by one's acquiring Right to the Teinds of his own Lands, they are not ſo confounded with the Stock, as that the Lands being thereafter Diſpon'd or Comprys'd, without mention of the Teinds; the Buyer or Compryſer ſhould have Right to theſe. For where Lands and Teinds are Poſſeſſed *diverſo jure*, the Latter are not of the Nature of a Servitude.

2. A Diſpoſition of Teinds for Onerous Cauſes to a Creditor, to be bruiked by him till he was compleatly payed of a Debt therein condeſcended on and ſpecified, conform to which he attain'd poſſeſſion of the Teinds, by receiving payment, and granting Subaltern Rights thereof, was not found a *modus habilis* of Conveyance, or a ſufficient Title to maintain the Creditor in his poſſeſſion againſt a ſingular Succeſſor; Or to defend him in a Spuilzie after Inhibition: But only a perſonal Security

(a) *February* 27: 1672: *Scot contra Muirhead.*

againſt

againſt the Granter. The Right not being ſet by way of Tack for a certain and definite time, or otherwiſe to make it real. (*a*) When Tithes are conveyed with all Title the Diſponer hath, had, or ſhall acquire thereto; Supervenient Rights acquired either by Statute or private Tranſaction *accreſcunt ſucceſſori.* (*b*) Warrandice or an Obligement to make up the Subject diſponed in caſe of Eviction, is a common Clauſe in Diſpoſitions, ſometimes expreſt; and ſometimes implied, as when the Right is granted for an Onerous Cauſe. In either of which Caſes, if the Diſpoſition import an abſolute Right, the Diſponer cannot cloth himſelf with any poſterior Title that would infer abſolute Warrandice againſt him, if in the perſon of another. Becauſe *jus ſuperveniens authori*, doth acreſce to his ſingular Succeſſor; even when the Right granted by the Author is reduc'd before acquiring of the other. But if only a particular Right be diſponed, or any Right the Diſponer hath at the time; He the Diſponer, may make uſe of an after acquired Right to elide the former. And if he then diſpone the poſterior Right to a third Party for an Onerous Cauſe, that ſingular Succeſſor may exclude him to whom the firſt Diſpoſition was made, albeit it contain Warrandice from the common Author's Fact and Deed. (*c*) Warrandice is never exten-

(a) *March* 27. 1628. *Lord Blantyre contra Pariſhioners of Bothwel.* (b) *December* 3. 1698. *the Laird of Allardice againſt the Viſcount of Arbuthnet.* (c) *July* 19. 1664. *Douglaſs contra L. of Wedderburn.*

ded to Diſtreſs or Eviction by ſubſequent Statutes, of which Purchaſſers muſt take their hazard. (*a*) Therefore no Proceſs was ſuſtained upon a Clauſe of Warrandice in a Diſpoſition of Teinds, for relief of a poſterior Impoſition of Stipend to a Miniſter. (*b*) But a perſon being provided to a certain quantity of yearly Rent out of the Teinds of ſome Lands, which were afterwards appointed by Law to be the Subject of a Stipend; The Granter of the Annuity was found lyable to make up the Deficiency of the Fund. (*c*)

3. An Obligement to diſpone is in ſeveral Caſes eſteemed equivalent to a Diſpoſition. But yet an Obligement to diſpone Tithes for a certain price contain'd in a mutual Contract, was found not to carry the Right to the Tithes in favours of a ſingular Succeſſor; unleſs he would either pay the price, or prove it to be payed; notwithſtanding of Fourty years poſſeſſion by vertue of the Contract. (*d*) Becauſe an Obligement to diſpone is no Diſpoſition, nor can make a Title for Preſcription; more than a Bond to grant a Charter and Seaſine can ſupply theſe: The ſame being neither a Decreet nor a compleat Right. And farther, whoever founds upon a mutual Contract, either by way of Action or Exception, muſt ſay that

(a) *July* 12. 1667. *Watſon contra Law. July* 1. 1676. *L of Auchintoul contra L. of Innes.* (b) *March* 27. 1634. *Lady Dunfermling contra the Earl her Son.* (c) *July* 28. 1635. *Lady Cardroſs contra Lord Cardroſs her Son.* 19 *June* 1697. *Hume of Linthil againſt Hume of Wedderburn.* (d) *February* 9. 1704. *Earl of Galloway againſt Mackguffock of Ruſco.*

the

the Counter-part of it is satisfied. But payment of the price in this Case being instructed, the Party in whose favours the Obligement to dispone is conceived, might exclude the Granter, or any representing him upon the common ground of *frustra petis quod mox es restituturus.* It was alledg'd for the person having Right to the Obligement to dispone, 1. That he, as a singular Successor, was not bound for the price, that being his Authors Debt. 2. The party obliged to dispone assign'd the price, and the Assigney pursued for it, which argues that the Cedent look'd upon himself as denuded of the Right of the Tithes. 3. The Obligement to pay the price was prescrived; And Prescription hath the same effect as payment. 4. If the Obligement to dispone had been contraveen'd by the Granters denuding himself of the Teinds in favours of another, the Contract cloth'd with possession would have excluded that other: And he could not have founded upon the not payment of the price, as being *jus tertii* to him. But all these Defences were repell'd. Because, 1. *Qui agit ex contractu, debet prius implere contractum.* 2. It is not to the purpose, that the price was assign'd and pursued for. For whoever sells by way of Contract has two Remedies, *viz.* Either they can pursue for the price, or recover the thing it self by vertue of their own Title, unless the other Party can make appear that the price is payed, or Security accepted for it. 3. One Parties Obligement in a mutual Contract cannot prescrive, while the

other doth ſtand. For as an Exception cannot preſcribe, ſo long as the Action is current: So neither can a Reply, ſo long as the Exception is competent. The power of diſponing and intereſt to receive the price, as well as the Right to the Teinds, and Obligation to pay, might indeed divide, the one going to the Heir, and the other to Executors. But that is not ſufficient to make them ſeparatly preſcribe, or the one preſcribe, and the other ſubſiſt. For the parts of a Contract are thus far inſeparably connected, that implement of the one cannot be ſought, without performance of the other.

SECT. IV.

Concerning Tacks of Tithes.

TACKS May not only be ſet of Lands, but alſo of Tithes, or any thing that is uſeful, or yields Profit. As Prelates; whether Monaſtick or Eccleſiaſtick, were uncapable, before the Reformation, to Feu out their Teinds: So neither could they grant long Tacks, for theſe were accounted Alienations. (a) And to the granting of ſhort Tacks, the conſent of the plurality of the Members of the Chapter, or Convent beſide the Setter behov'd to be adhibited. Therefore a Tack of Teinds ſubſcrib'd by the Provoſt of *Lincluden*, and the

(a) *Balfour Pratt: Craig, Lib: 2: Dieg: 10.*

equal

equal half of the Chapter, was found null, in regard the Provoſt, as the direct and principal Setter, could not be reckon'd to make up the *Quorum* of the Chapter, whoſe Conſent to the Provoſt's Deed, ſhould have been teſtified by the Subſcriptions of a Majority beſide himſelf. (*a*) But then the want of the Subſcriptions of ſuch perſons of the Chapter, as were either out of the Countrey, or Minors not paſt Fourteen Years of Age, was not judg'd a Nullity in the foreſaid Tack; albeit theſe enjoyed their own ſhare of the Patrimony of the Benefice, and were the moſt part of the Chapter, if the plurality of the reſt were conſenting: Nor is it needful for any of the Chapter to conſent, if all of 'em be Minors. (*b*) It is ſufficient to the Validity of a Prelates Deed, that perſons, as Members of the Chapter or Convent, are ſubſcribing to it, without neceſſity either to inſtruct their Admiſſion, or to ſhew by the Erection-Charter, that Subſcribers are at leaſt the Majority. But this admits of contrary Probation: For a Tack being only ſubſcrib'd by the Provoſt of a Collegiat Church, and three of the Prebends, was found null, as wanting the Conſent of moſt part of the Chapter: In reſpect the ſame was proven to have conſiſted of eight perſons beſide the Provoſt, by production of proviſions given to eight Subaltern Prebends, and of ſome Feus or Rights ſet by the Provoſt with

(a) *March* 14: 1622: *L. Drumlanrig againſt Maxwel of Hills.* (b) *Eodem die inter eoſdem.*

their

their Consent, without necessity of producing the Foundation-Charter. (*a*) The necessity of a Chapterly Consent to the Deeds of Prelates, was carried so far, that the Deanry of the Cathedral Church of *Aberdeen* being mortify'd to the Colledge, Tacks of the Rents on't set by the Principal and Members, without Consent of the Bishop and his Cathedral Chapter was found null. Because, by the Mortification of the Deanry and Rents thereof to the Colledge, the Dignity was not extinct, but the Colledge came in place of the Dean; and their Deeds requir'd the Consent of the Chapter, as the Deans did formerly. (*b*)

2. As nothing could be done by a Prelate without the Concurrence of the most part of his Chapter: So neither could the particular Members of the Chapter do any thing in their particular Benefices, without him and the Majority of the Chapter consenting. But the Consent of the new Chapter of St. *Andrews*, erected by the second Act of the Parliament 1617, was not found necessary to a Tack of Teinds set by a Member thereof in his proper Patrimony, not belonging to the Bishoprick. Because the Act appoints only a special Chapter for authorising the Bishops Deeds by their Consent: Which could not be extended to infer a necessity of the like Consent by the Bishop and his Chapter to Deeds done by a Member of the Chapter, where such a Con-

(a) *June* 24: 1623: *Inter eosdem.* (b) *March* 26: 1629: *Colledge of Aberdeen contra Menzies.*

sent

ſent was not neceſſary before that Act. For ſome of that Chapter might have their own proper Chapter, or might poſſeſs Benefices pertaining to the preſentation of Laick-Patrons: And ſo no Conſent would be requiſite in theſe caſes, but of their own Patrons or Chapter. (*a*)

3. As I obſerv'd in another place, (*b*) the Votes are to be reckon'd according to the Number of Benefices, and not of the Beneficiaries; the Chapter Members need not to be Chapterly conveen'd, but their Conſent will be good though ſeparatly obtain'd, if before the Death or Deprivation of the principal Granter of the Right; the Seal of the Biſhop and Chapter of St. *Andrews* doth ſtand for their Subſcription; and in all Caſes, where there is no Chapter or Convent, the common Seal, with the Kings Confirmation, is all the Solemnity required to the Prelates Deed.

4. By the common Law, benefic'd perſons might have granted Leaſes or Tacks, *concurrentibus his quæ in jure requiruntur*, for as many Years as they pleas'd: But now they are bound up and reſtrain'd by Acts of Parliament to certain Limitations and Proviſions. Whereby Prelates are render'd incapable to ſet their Teinds in Tack, even with the Chapters Conſent, for longer than Nineteen Years, and inferior benefic'd perſons to ſet for longer, with Conſent of their Patron, than their own Life-

(a) *November* 9: 1624: *Hope contra the Miniſter of Craighall.* (b) *Part.* 1: *Chap:* 8: *Sect:* 1, *N:* 4.

time,

time, and five Years after. (*a*) But inferior Beneficiaries need not to consult the Patron, in the setting of three Year Tacks: (*b*) And longer Tacks are valid for three Years. (*c*) A Patrons accepting of a Right to a Tack was understood as a subsequent Consent thereto, (*d*) and a Tack was found sufficiently authoris'd by the Consent of one, in whose favours an Obligement to dispone the Patronage was conceiv'd. (*e*) As to the Question whether an Ecclesiastick having a Commission from his Patron to set Tacks, needs any more expres's Declaration of his Patrons Consent to particular Tacks set by him; *vide Part* 1. *Ch.* 8. *Sect.* 2. *N.* 4.

5. Tacks of Teinds are either Conventional or Judicial. Under Judicial Tacks I comprehend these set by Order of the Commission of the Church, which were not liable to be stinted to the course of time prescrib'd by the 4. *Act, Parl.* 22. *Ja.* 6. Conventional Tacks were the only habile way of transmitting Teinds of old, and are yet the ordinary way.

6. The Terms of Entry and Ish in Tacks must be expres's'd and certain. If the time of Entry is not specified, its understood to be from the Date of the Tack. Tacks without a definite Ish are null: (*f*) Therefore Sub-

(a) *Act* 4: *Parl*: 22: *junct*: *Act* 15: *Parl*: 23: *Ja*: 6. (b) *Act* 200: *Parl*: 14: *J*: 6. (c) *July* 18: 1668: *Johnstoun contra Houdoun.* (d) *January* 19: 1669: *Earl of Athole contra Robertson of Strowan.* (e) *July* 6: 1666: *Parson of Morum contra the Lairds of Beirford and Beinstoun.* (f) *July* 17: 1688: *Oswald contra Ross.*

Tacks

Tacks of Teinds granted by the principal Tacksmen to the Heretors for the Annualrent of borrowed Money, as the Tack Duty during a certain Number of Years, and thereafter ay and till Re-payment of the Money, was found null as to Singular Successors, except for particular Years therein-specified. (*a*) But Tacks in Wadsets are valid without a definite Ish, *viz.* During the not Redemption; and in Prorogations Tacks of Teinds to begin after the Ish of the former, though the Titular be in the *interim* denuded. Because the Wadset is granted with the Burden of the Back-Tack, which is *in Corpore Juris*, and is only a Restriction of the Wadset Right; and Prorogations are even by Authority of Parliament. (*b*)

7. A Tack without a particular Duty is null *quoad* Singular Successors. (*c*) One who had a Tack of his own Teinds having obliged himself to warrand an Infeftment in his Lands free of all Teind except the Tack Duty, upon which Infeftment and Possession followed; and having afterwards assign'd the Tack for an Onerous Cause: The Obligement to warrand was found equivalent upon the matter to a Sub-Tack, or an Assignation to the Tack; and therefore the Receiver was prefer'd to the posterior Assigney. (*d*) But yet an Obligement to dispone Tithes for a certain price contain'd in a mutual Contract was not found to make a

(a) *July* 8: 1673: *Montgomery contra Parishioners of Kirkmichael.* (b) *Dirletoun Doubts and Questions in Law, Title Back-Tacks.* (c) *Stair Instit: Lib:* 2: *Tit:* 9: § 29. (d) *March* 20: 1629: *L: Finmouth contra Weems.*

Title

Title for Prescription even to a Singular Successor: Unless he would either pay the price, or prove payment thereof. (a) Tack Duties affect all conjunct Tacksmen *in solidum*, in so far as their Intromission extends. (b) Sometimes the Tenent gives a Grassum beside the Tack Duty. Tacks of Teinds us'd in old time to be granted for small Tack Duties and large Grassums: But now Tack Duties are rais'd and Grassums fallen low. A Charge upon a Bond granted by the Town of *Glasgow* to their Bishop, as a Grassum for a Tack of Tithes, was sustain'd, although it was alledg'd for the Town, 1. That the Bond was exorbitant, and the Burgh lesed thereby. 2. That the Tack was null, as granted by the Setter industriously to prejudge his Successor, after the Setter had a clear prospect of promotion to the See of St. *Andrews* then vacant. 3. The Entry of the Tack was confer'd *in tempus inhabile* after the Bishops Translation, and so might be quarrel'd by his Successor. (c) The Reasons of the Decision were, 1. Albeit Magistrats of Royal Burghs cannot alienate their Freedom and Priviledges essentially constituting them a Burgh, without Consent of Parliament: Yet they have the free and full Administration of all Affairs thereof. Succeeding Magistrats may indeed pursue them for Damages by Malversation, or Mismanage-

(a) *February* 9: 1704: *E: of Galloway contra Mackguffock of Rusco.* (b) *July* 14: 1675: *Colledge of Aberdeen contra the E of Northesk and others.* (c) *November* 1685. *Arch-Bishop of St. Andrews against the Magistrats of Glasgow.*

ment:

ment : But cannot annul their Deeds in favours of a Third Party, which would cut off all Commerce and Tranſaction with Burghs. 2. It was *Jus Tertii* to the Town, and only competent to the ſucceeding Biſhop to quarrel the Tack upon theſe Nullities.

8. The Contracters Names are a neceſſary Subſtantial in a Tack, which ſhould be clearly expreſs'd. Albeit Tacks are *ſtrictiſſimi juris*, they will go to Heirs, even without a Service, when Heirs are not therein mentioned. It was Debated (*a*) though not Decided, If a Tack of Teinds ſet to a perſon and his Heirs in particular Lands, would belong to his Heirs whatſoever, when theſe lands are ſold by, or Adjudg'd from him ? But there ſeems to be good Reaſon, why in ſuch a caſe the Tack ſhould paſs to Heirs whatſoever. For the Qualification in Favours of Heirs in ſuch or ſuch Lands, is only deſign'd to clear the Fiars intention as to the perſons he deſires to ſucceed him in the Right of the Tithes : And no Limitation or Clauſe irritant, inferring the Loſs of them upon his being denuded of the Lands. A formal Tack in Writ containing the Subject ſet, Contracters Names, Tack-duty, Iſh, and Entry diſtinctly therein expreſs'd, and cloth'd with Poſſeſſion, will Defend the Tenent againſt Purchaſers, and a Superior as to Liferent Eſcheats ; but not againſt the Superior of a Ward-Vaſſal, claiming the Ward and

(a) *Betwixt the Duke of Lauderdale and the E. of Tweddale January* 23. 1678.

Non-

Non-entries; though he be oblidged to continue the Tenent in Poſſeſſion till the next Term of *Whitſunday*. (*a*)

9. Beneficed perſons cannot effectually ſet new Tacks till the Old be expyr'd; and if they ſet Tacks to begin after the Iſh of the former, and die in the Interval before the time of Entry by the laſt Tack, the ſame is null. (*b*) No Tutor nor Tutor's Factor may take a Tack to his own behove of the Teinds of the Minors Lands: and if he do, the ſame will accreſce to the Minor. But ſuch a Tack of Teinds where the Lands were Liferented by the Tackſman's Wife, was ſuſtain'd for her Lifetime. (*c*)

10. A Tack of Teinds was Elided, and underſtood to be paſt from by after payment of more than the Tack-duty: although that was alleadged to have been done by way of Gratification. (*d*) And the accepting of a New one, differing in the Subſtantials of Tack-duty, in Durance, and commencement from a former, and beginning before the Iſh thereof, is underſtood to be an Innovation, and paſſing from the other, though Ratified in the laſt Tack: as being incompatible therewith, unleſs there be alſo a Proviſion to bruick by either of the Tacks. (*e*) Clauſes irritant in Tacks are not ordinarly

(a) *Act* 26. *Par.* 3. *Ja.* 4. (b) *June* 18. 1629. *Dumbar contra Turner.* (c) 28 *March* 1632. *Lady Ludquhairn contra* L. *Haddo.* (d) *November* 9. 1677. *Rutherfoord contra Murray of Skirling.* (e) 23 *January* 1678. *Duke of Lauderdale contra the E. of Tweddale.*

purgeable

purgeable after they are once incurr'd. But where the irritancy in a Tack of Teinds was incurr'd through a probable ground of ignorance, the Party was allowed to purge at the Barr by payment of the Tack-duty and Dammages. (*a*) Objections and Nullities againſt Tacks of Teinds, are excluded by Preſcription. (*b*)

11. Short Tacks cannot be aſſigned, if not expreſly granted in Favours of Perſons and their Aſſignies: But Liferent Tacks may. (*c*) And fall under the Aſſigneys ſingle Eſcheat. Not as if an Aſſignation altered the Nature of the Subject aſſigned, by making that moveable, which before was Heretable: But becauſe an Aſſigney has not the Right for his own Life-time, but only while the Cedent lives, who may die before him.

12. Some Tithes are Tax'd by Rentals to ſo many Bolls yearly, either expreſly, or tacitely by long uſe of payment, from which a Rental is preſum'd. Expreſs Rentals are ſometimes formally perfected by a Writ under the Teind-maſters hand. Sometimes they'r only Recorded by way of *memorandum* in his Book: and then make Faith againſt the Titular and his Heirs; (*d*) but not againſt ſingular Succeſſors. (*e*) Rentals are tacitely

(a) *July* 14. 1675. *Colledge of Aberdeen againſt the Earl of Northesk.* (b) *July* 7. 1677. *Parſon of Preſtounhaugh againſt his Pariſhioners. July* 14. 1675. *Old Colledge of Aberdeen againſt the E. of Northesk and others.* (c) *July* 16. 1672. *Duff contra Fouler.* (d) *Stair Inſtitut. lib.* 2. *tit.* 9. §. 18. (e) *July* 5. 1625. *Aytoun contra Tenents.*

interrupted

interrupted by contrary uſe of payment, or expreſly by taking Tacks for a definite time.

13. If a Tackſman of Tithes continue quietly to poſſeſs after the Tack is out, he will have the Benefite of *Tacit* relocation, which is to be Subject only to the former Tack-duty, till interrupted by Citation or Inhibition. Simple uſe of payment infers *Tacit* relocation, and Defends till interruption. (*a*) For in that caſe a verbal Tack is preſum'd. *Tacit* relocation, though introduc'd from a preſum'd Conſent, is ſo far eſtabliſhed by Law, that payment of a ſmall Teind-duty to a Miniſter after he was denuded of his Right to the Tithes was ſuſtain'd, both as an intire Exoneration for years pay'd, and as a Rule to the Titular in exacting of the Teind till interruption. (*b*) And *Tacit* relocation upon a Tack ſet by a Benefic'd perſon, was allowed as a good Title to purſue according to former poſſeſſion for the Teinds of more years than the Benefic'd perſon could ſet. (*c*) But Tacit relocation being only a preſumptive continuation of the Right, it was found to be taken away by an expreſs inconſiſtent Deed of the Setter, Homologating another perſons Right, although no interruption was us'd againſt the *Tackſman*. (*d*) Nor doth our Law diſtinguiſh betwixt natural or immediate, and ci-

(a) 28. *November* 1676. *Sheil contrtà Pariſhioners of Preſtounhaugh.* (b) *January* 19. 1669. *E. of Athol contra Robertſon of Strowan.* (c) *January* 16. 1663. *E. of Errol contra the Tennents of Urie.* (d) *July* 18. 1671. *E. of Hume contrà L. Ryſlaw.*

vil Poſſeſſion. (a) And therefore to prevent the Surprize, and Diſappointment of Titulars and Tackſmen we indulge Tacit relocation, not only to immediate and natural Poſſeſſors, but alſo to Tackſmen of Teinds. And if it were otherwiſe, the Conſequence would be Dangerous: ſince what then could hinder Titulars and old Tackſmen of Teinds to conveen all Heretors, whoſe Tacks and Sub-Tacks of their own Teinds are long ago ſecretly expyr'd for the full Value, *thirty nine* years backward; their Tennents of Stock and Teind joyntly, being ordinarly the natural Poſſeſſors. The continuing then to uplift accuſtomed Teind-duties, being ſuch a Poſſeſſion as the Nature of the Subject, at leaſt the common uſe thereof, doth admit, it muſt furniſh the Benefite of Tacit relocation. There be two Deciſions, 12 *December* 1621, *L. Lag contra Pariſhioners of Lintoun, and* 6 *March* 1632, *Lady Lauriſtoun againſt her Tennents*, Which ſeem at firſt view to Claſh with what I have advanc'd; But they proceed upon Specialities: For in the former the Tackſman's taking a new Tack to commence a year after the Iſh of the firſt, without comprehending the intermediate year under Debate, was a Tacit paſſing from Tacit relocation; and in the Latter, the Sub-Tennents paſſing by the Tackſman, and paying his Rent to the Principal Setter, was a perſonal

(a) *December* 2. 1628. *Whiteford contra Johnſtoun.*

Objection to hinder him from Counteracting his own Deed. Altho *Tack*ſmen of other Mens *Teinds* have the Priviledge of *Tacit* relocation by ſeven years Poſſeſſion of Uplifting the Teind-duties: Yet the Earl of *Dumfermling*, who was Forfeited in the year 1690, having had from King *Charles* the firſt, a Tack of the Teinds of *Dumfermling*, which expired in the year 1695, and his Eſtate having been under Sequeſtration ever ſince the Forfeiture, in the hands of Factors put in by the Lords of Seſſion, upon application of Creditors who had Adjudg'd the Tack, without Receiving before it was expyr'd from the Factor any part of the Duties: the Factors Poſſeſſion was found not to operate Tacit relocation in Favours of the Creditors, to the prejudice of the Queens Right by the Forefaulture, and Expiration of the Tack. (*a*) Albeit no Forefeiture doth now hinder lawful Creditors to affect Tacks ſtanding in the Forefeited Perſon.

(a) *February* 1705. *The Officers of State againſt the late Factor and Creditors of Dumfermling.*

SECT, V.

SECT. V.

Concerning Rights of Tithes acquired, and Extinguished by Possession.

TEmporary and Qualified Rights of Tithes are acquired to Church-men, without any Title, by three, or seven, or ten, or thirteen years Possession; and absolute perpetual Rights by Possession for the space of *Fourty* years. (a) Laicks having Titles though Lame, acquired *Possessory* Judgements by seven years uninterrupted Possession, and absolute Rights by the long Prescription of *fourty* years.

2. As real Rights of Property, which are the most fix'd and Substantial part of what a Man doth call his own, goes only by Succession to Heirs, for keeping up of Names and Families: So our Law doth Secure such as have by singular Titles, attain'd and continued in Possession of any of these important Rights, for the space of seven Years, from being disturbed at Random; allowing them to Defend their Possession without Disputing Summarly upon their Titles, which can only be taken away by Reduction, or Declarator, or in a Competition of Rights; and then Authors must be cited. This we call the

(a) *Vid. Part* 1. *Chap.* 9. *Sect.* 2.

Benefit of a Poſſeſſory Judgement, which hath ſome faint Reſemblance of *actio publiciana* in the Civil Law. It was introduc'd partly as a puniſhment to negligent perſons for not purſuing their Intereſt ſooner: Partly from a conſideration of the preſumption of Right by poſſeſſion long acquieſced in, and the general intereſt of Poſſeſſors, not to be put to a ſummar Debate upon their Author's Right, that probably is not in their hands, and whereof they are not ſuppos'd to know the Circumſtances and Import ſo well as the Author himſelf, who therefore muſt be called.

3. Seven years poſſeſſion upon an Infeftment of Tithes is a good ground of a Poſſeſſory Judgement. Yea, the Exception of ſuch a poſſeſſion upon an Infeftment in Vicars Land *cum decimis incluſis*, where the Teinds were not contain'd in the Diſpoſitive Clauſe, but only in the *Tenendas* and the *Reddendo*, was found Relevant to defend in a Poſſeſſory Judgement. (*a*) But a perſon having been ſeven years in poſſeſſion by vertue of an Infeftment in Stock and Teind, and produc'd his Authors Right, that was only a perſonal Obligement to diſpone a Tack of Tithes for a price, contain'd in a Minut of Contract, was found not to have the benefit of a Poſſeſſory Judgement. (*b*) And in a Competition for the Annualrent of the price of Teinds after a Decreet of Sale, the Lords found no

(a) *July* 13. 1636. *Biſhop of Edinburgh contra Brown.*
(b) *July* 9. 1703. *Earl of Galloway againſt Mackguffock of Ruſco.*

Poſſeſſory

Poſſeſſory Judgement upon an Infetment in theſe Teinds and poſſeſſion before the Valuation. (*a*) Becauſe by the Sale poſſeſſion and Property were confounded, and the very Subject innovat; the price being come in place of the Teinds, which is not the proper Subject of a Poſſeſſory Judgement, and the Annualrents not ſurrogat to the Fruits, but ariſing *ex accidenti*, for that the Money had not been inſtantly taken up.

4. Some are of Opinion, that Tacks of Tithes, whereupon no Infeftment can follow, though clothed with ſeven years poſſeſſion, do not carry a Poſſeſſory Judgement; as if the Favour of an Heretable Infeftment were the only cauſe of that Priviledge. This Sentiment I cannot ſubſcribe to; Becauſe it ſeems to contradict the Analogy of Law, the Nature of a Poſſeſſory Judgement, and the Current of Deciſions. For, 1. A Poſſeſſory Judgement is competent both for, and againſt Servitudes: (*b*) And Tithes are a kind of Servitude or Burden affecting the Profits of Lands. (*c*) 2. My Lord *Stair* ſays in one place, (*d*) That Rights equivalent to Infeftment are the Title of a Poſſeſſory Judgement; And in another, (*e*) That a Poſſeſſory Judgement is an Effect of Infeftments, Tacks, or the like. 3. The Favour of Infeftment cannnt be underſtood as

(a) *February* 16. 1703. *Scot of Bowhil againſt Jerviſwood and the Earl of Hume.* (b) *Stair Inſtit: lib.* 4. *tit:* 17: §. 2. *and* 3. (c) *Ibid: lib:* 2. *tit:* 8. *Pr.* (d) *Ibid: lib:* 4. *tit:* 22. §. 5. (e) *Ibid: lib:* 2. *tit:* 1. §. 24.

the only Reason of a Possessory Judgement: for a Tack of Lands from one as Heretable Proprietar, gives the Tacksman the Benefit on't, without necessity upon him to alledge that the Setter of the Tack was infeft. (a) But I may say the unaccountable negligence of the Proprietar is one of the great Motives of a Possessory Judgement: Seeing it takes no place against the Queen, who is not prejudged by the neglect of Her Officers. 4. The same Reason that secures a Possessor by Infeftment, though flowing from him who had no Right, and frees him from the whole Duties; should much rather secure a Tenent from payment of more than his Tack-duty, till his Tack be reduc'd. For a Tack is a real and compleat Right *in suo genere*, effectual by Act of Parliament against singular Successors; And all the other Reasons for a Possessory Judgement, *viz.* The favour of possession, the negligence of the party interess'd, and the Author's not being in the field, do concur and take place in Tacks. 5. It can be made appear from a multitude of Decisions, that Tacks of Tithes cloth'd with seven years peaceable possession, are the habile Subject of a Possessory Judgement. It was sustain'd upon a Tack of Teinds set by an Abbot. (b) Where also the Nullity of a Diminution of the Rental, contrary to the Act of Parliament 1581, by an undervalued Conversion of Victual into Silver-duty, was

(a) 1 *December* 1676. *Hume contra Scot.* (b) *July* 13. 1636. *Bishop of Edinburgh contra Brown.*

not

not receiv'd by way of Exception againſt a tack of Tithes. A Poſſeſſory Judgement was ſuſtain'd in favours of a Tackſman of Teinds who poſſeſs'd *bona fide*, albeit his Authors Right was reduc'd; the Tackſ-man not being cited in the Reduction. (*a*) Though ſeven years poſſeſſion after interruption of the *bona fides* by a Proceſs, was found not to be the ground of a new Poſſeſſory Judgement. (*b*) Yea, even a Tack of Teinds ſet by a Liferenter, was found to afford this priviledge upon ſeven years poſſeſſion, after the Granters Death. (*c*)

It is needleſs to object, that the priviledge of Poſſeſſory Judgement takes no place againſt a poinding of the Ground for Annualrents, Feu-duties, or other Real Burdens. For a *debitum fundi* is compatible with poſſeſſion of the Property, which it only affects: Whereas poſſeſſion of the Teind *pro ſuo*, whether by Tack or Infeftment, is inconſiſtent with, and excluſive of anothers Right and poſſeſſion at the ſame time. But an Heretors ſimple poſſeſſion of his Tithes without a Title, or his not payment for ſeven years, doth not furniſh a Poſſeſſory Judgement, more than ſuch a poſſeſſion for Fourty years would infer Preſcription. 'Cauſe 'tis plain in that caſe the Tithesbelong to ſome body elſe, being due out of all Lands not priviledg'd: And the Proprietar of the Lands could not *bona fide* poſſeſs the

(a) *July* 19. 1664. *Dowglaſs contra L. of Wedderburn.* (b) *Inter eoſdem.* (c) *January* 23. 1678. *Duke of Lawderdale contra the Earl of Tweddale.*

Tithes

Tithes *sine titulo.* And this is my Lord *Stair's* meaning, when he tells, *That a Possessory Judgement is not competent in Actions for Teinds, because the Rights thereof are Notour.* (*a*)

5. A Possessory Judgement is not competent without seven years *bona fide* possession. But possession *bona fide* for a little time in Moveables, and a Year, or Term, or thereby, in Heretage, is sufficient, as to the Effect of making *fructus consumptos suos.* (*b*)

6. It is a Question much toss'd, but very indistinctly handled by Canonists and others, Whether Tithes fall under Prescription? Some maintain the Negative, because Tithes belong to the *Parochus,* as a Reward for his performing of the Ministerial-duties. (*c*) And that in acknowledgement of our Subjection, and GOD's *Dominium Universale;* (*d*) which are subject to no prescription of time. (*e*) Others stand to the Affirmative side of the Question, upon these Grounds; 1. Custom is laid down as the Standard for determining the payment of Tithes. (*f*) And that they may be prescribed is supposed and implyed, *C. cum contingat* 29. *C. dudum* 31. *Extr. de decimis, C. ult. §. pen. Eod. in* 6. 2. All Matters of Property are lyable to prescription, unless specially

(a) *Instit: lib:* 4. *tit:* 17. § 3. (b) *Ibid: lib:* 2. *tit:* 1. § 24. (c) *C. pervenit* 9. *caus:* 16. *q.* 1. (d) *C. tua nobis* 26. *Extr: de decimis.* (e) *L.* 6. *C. de prescript:* 30. *vel* 40. *annorum.* (f) *C. cum sint:* 18. *C. ad Apostolicæ* 20. *Ext: de decim.*

fenced

fenced againſt it: (*a*) Which cannot be ſaid of Tithes.

7. But moſt of theſe Opinioniſts of both Perſwaſions do ſo confound the acquiring Rights to Tithes by Preſcription, with the preſcription of a priviledge of not paying Tithes, that in ſtead of Illuſtrating they Darken the Controverſy. Many have endeavoured to trim up and adjuſt theſe different Opinions, by Diſtinctions, to their particular Fancies. We find ſome who hold that a Right of Tithes is liable to preſcription, at the ſame time reſtricting priviledge to Eccleſiaſticks by the *C. cauſam quæ 7. Extr. de preſcript.* And with this Quality, that even ſuch cannot preſcribe a Right to Parochial Tithes, unleſs where the Miniſter is competently provided beſide. (*b*) Only they except the Caſe of Tithes truely or preſumptively Feu'd to Laicks before the *Lateran* Council: Which they allow one Lay-man to preſcribe againſt another. (*c*) *Raymond*, *Hoſtienſis*, *Panormitan*, and *Boerius*, ſay, That Perſonal Tithes are lyable to preſcription, as not being ordained by the Law of *Moſes*, but that Predial-tithes cannot preſcribe; Others maintain, That though the Right of theſe cannot preſcribe, the *Quota* may; (*d*) And the Biſhop of *Worceſter* (*e*) tells

(a) *C. nihil prodeſt 2. C. accedentes 11. C. auditis 15. C. cum ex officii 16. Extr: de preſcriptionibus.* (b) *Covarruv: var: reſol: lib: 1. cap: 17. N. 6. Barbos: de officio & poteſt: paroch: cap: 28. § 2. N. 48 & 49.* (c) *Ibid: N. 51.* (d) *Traite touchant l' origine des dixmes & l' obligation de les payer. ſect: 29.* (e) *Eccleſiaſtical Caſes relating to the Rights and Duties of the Parochial Clergy, pag: 218 and 219.*

us,

us, That the *English* Judges fell once upon the Knack of distinguishing betwixt *Decimam Garbam*, and *Decimas Garbarum*, finding that the Lord of a Mannour might prescribe a Right to the former, but not to the latter. Some think that Laicks may prescribe an Immunity from paying Tithes out of his own Lands, by immemorial possession of Freedom; but that a Right to other Mens Tithes, as a thing more unfavourable, cannot be so acquired. (*a*) Others contend, that Lay-men cannot prescribe an utter Exemption from payment of Tithes, but only as to the Quantity, and *modus decimandi*; Yet that Prescription both qualifies the payment, and determines the not payment in favours of Ecclesiasticks. (*b*) Some again are as positive, That neither Laick nor Clergy-man can prescribe an Immunity from payment of Tithes even by 1000 years, unless against a Lay-man to whom they were feued before the *Lateran* Council. (*c*) Others there be who distinguish nicely betwixt Custom and Prescription. (*d*) And *Lastly*, Those who assert that prescription of a Right to the great Teinds carries the smaller as an Accessory; If at the beginning of the prescription small Teinds were payed, and no other person during the Currency receiv'd them. (*e*)

(a) *Canisius de decimis cap*: 17. *N*. 16. (b) *Hughs parsons Law, chap*: 25. (c) *Rebuff de decimis Quæst*: 13. *N*. 55. (d) *Covarruv*: *var*: *resol*: *lib*: 1. *cap*: 17. *N*. 8. *vers*: 10. (e) *Al*: *monet cum auctar*: *otton*: *breviar de decim*: *cap*: 4.

8. That

8. That amid'ſt ſuch perplext variety of Sentiments, we may ſteer a diſtinct Courſe, in order to a right underſtanding how Teinds preſcribe; We are to diſtinguiſh the Parſonage from the Vicarage, and the Poſitive Preſcription from the Negative. By the poſitive Preſcription, we mean a Right to Tithes acquired by Fourty years poſſeſſion, and by the Negative, an Exemption from payment.

9. There is no Negative Preſcription of Parſonage Tithes: (a) That is, no courſe of time doth ſopite and extinguiſh the Obligation to pay ſuch Tithes. 'Tis true private Rights are loſt by not being claim'd or made uſe of within Fourty years, as a juſt puniſhment of the negligent perſon, in whoſe favours they are conceiv'd: And theſe being excluded from any pretenſion through their long ſilence, ſuch as were formerly lyable are ſecure, ſince no body elſe can moleſt them. But the obligement to pay Tithes being founded on publick Law, and not upon private Right, the *jus exigendi* continues, though not exerced for Fourty years: Unleſs that Law ſhould univerſally go in deſuetude. Nor can any perſon preſcribe a Right to his own Tithes without a Title; no more than one could preſcribe an Immunity from Cuſtoms or Feuduties, if they ſhould chance not to be requir'd within Fourty years. But then preſcription will ſweep away the bygone Teind-duties pre-

(a) *Eſpeiſſes des benefices Eccleſ. tit:* 10. *ſect:* 3. *N.* 4 & 5. *Grimaudet des diſmes liv:* 3. *chap: dernier.*

ceeding

ceeding Fourty years. (*a*) And a Tack of Teinds not cled with poſſeſſion within Fourty years from the date, was ſuſtained for the time coming; and the Duties only preceeding Fourty years found preſcrib'd. (*b*) This being agreeable to the Nature of annual Preſtations; whereof every one imply a diſtinct Obligement, and preſcribe by Fourty years ſilence of the Creditor. (*c*) Yea, Preſcription will exclude Teind-duties within Fourty years of the laſt payment, if not purſued within that time. (*d*) But though the Negative Preſcription doth not commonly hinder the Titular from ſeeking the Tithes of all years within the Term of Preſcription: Yet an Heretor having *bona fide* upon a colourable Title of Exemption intromett with, and conſum'd his Teinds for Fourty years and more, without Interruption; was not found lyable for bygones. (*e*)

10. Since Preſcription runs againſt Churchmen as well as others, and is effectual to fortifie any colourable Title; a Right of Parſonage Teind may be preſcribed, as well as others by the poſitive Preſcription. (*f*) Which poſitive Preſcription extendeth even to long Tacks; not to make them perpetual, but unquarrellable during their time. (*g*) For Objections

(a) *Faber in ſuo God: lib:* 1. *tit:* 2. *Def:* 66. *February* 7. 1666. *Earl of Panmure contra Pariſhioners of* . (b) *January* 19. 1669. *Earl of Athole contra Robertſon of Strowan.* (c) *L.* 7. § *ult: C de præſcriptione* 30 *vel* 40 *annorum.* (d) *Arg: February* 7. 1672. *Blair contra Blairs.* (e) *June* 16. 1681. *Frieland contra L. of Orbiſtoun.* (f) *Stair Inſtit: lib:* 2. *tit:* 12. § 21 & 22. (g) *Ibid.*

and

and Nullities againſt Tacks are excluded by Preſcription. (*a*) And poſſeſſion of a part of Teinds in a Tack is ſufficient to confirm the Tack as to the whole. (*b*) A Tack of Tithes ſet to a Laick by a benefic'd perſon for ſeveral Lifetimes, and nineteen Years before the Act of Parliament 1621, was ſuſtain'd upon the account of Preſcription, whereof the running was not found to be hindered by the Setters Lifetime, altho *non valebat agere.* (*c*) A Right of Tithes acquired by the poſitive Preſcription, is ſtill but a Right of Tithes, and liable to the common Burden of Miniſters Proviſions and Augmentations; For even the Commiſſion's Decreet of Sale for a juſt price doth not ſecure againſt theſe. Two perſons having entered into a mutual Contract, whereby the one was oblig'd to diſpone ſome Tithes to the other, for a certain price to be paid by him: It was found, that the Obligement to pay the price could not preſcribe, while the Obligement to diſpone was current. (*d*) But yet Preſcription was ſuſtain'd againſt one of the Parties in a Contract of Marriage, as to his *Jus perſequendi Solutionem Dotis*, altho Interruption was us'd, and Decreet obtain'd by the other upon the Obligement to imploy the

(a) *July* 7: 1677: *The Parſon of Preſtounhaugh contra his Pariſhioners. July* 14: 1675: *Old Colledge of Aberdeen againſt the Earl of Northesk and others.* (b) *Spotſwood de Poſſeſſione, Lady Merchiſtoun contra Laird of Wrightſhouſes: Stair Ibid: Tit:* 1: § 13. (c) *February* 1685: *Paterſon againſt the Heretors of Newhall.* (d) *Vid: ſupr: Chap:* 6: *Sect:* 3.

Money

Money upon Land for the Heirs mentioned in the Contract. (*a*) Becauſe the Objection of Non-payment of the Tocher was competent to the perſon payable to, when Execution was ſought againſt him for imploying thereof, and being omitted, it was probable, that the Money was paid.

11. Preſcription of a Right to Tithes is not to be extended to the Tithes of *Novalia*: (*b*) That is, he who preſcribes a Right to the Tithes of all the Arable Land in any Pariſh, cannot thereby pretend to the Tithes of ſuch as afterward happens to be brought in and laboured. For *Præſcriptiones certorum Jurium de præſenti, non extenduntur ad futura conſimilia.* And beſides that Preſcription is a Priviledge which ought to be ſtrictly interpreted, and not extended; the *Novalia* were not formerly poſſeſs'd, and ſo can never come under it: Seing *Præſcriptio ſine Poſſeſſione non procedit.* (*c*) *Et tantum præſcriptum quantum poſſeſſum.* So much for the Preſcription of Parſonage Tithe; we ſhall next enquire into that of the Vicarage.

12. Vicarage Teind doth vary according to the cuſtom of places, and may be either introduced, or modified, or taken off by Preſcription. So that both the Negative and Poſitive

(a) *November* 27: 1630: *Laird of Lauder contra Laird of Colmſlie.* (b) *C. cum contingat* 29: *Extr: de Decimis, C: ult: § ult: eod: Tit: in* 6: *Covarr: Var: Reſol: Lib:* 1: *Cap:* 17: *N:* 13: *Caniſ: de Decimis, Cap:* 11: *N:* 2: *Rebuff: de Decim: Q.* 14: *N:* 18: *&* 25: *Bruneman. de Jure Eccleſ: Lib:* 2: *Cap:* 6: *N:* 9. (c) *Reg:* 3: *de Reg: Juris in* 6.

Preſcription

Preſcription takes place here. For Inſtance 40 years poſſeſſion was ſuſtain'd to entitle the Miniſter to a certain Vicarage Duty out of Salt and every Weavers Loom in the Pariſh. (*a*) Long cuſtom was found to determine the 20 Lamb to be the Teind. (*b*) A Right of Teind Fiſh was found conſtitute againſt the Buyers by uſe of payment paſt Memory of Man. (*c*) Vicarage Teind was not found due out of the Yards, which had never payed Vicarage before. (*d*) And 40 Yars poſſeſſion of Immunity from Teind Fiſh, is a Ground of Exemption in time coming. (*e*) 'Tis true, in the cited circumſtantiat caſe, the Lords required immemorial poſſeſſion; but that was only in reſpect of the time the Biſhops had been out. As to immemorial poſſeſſion, I ſhall content my ſelf to notice *èn paſſant*, that *Rebuff* (*f*) will not have any perſon to be a habile Witneſs for proving thereof, who is not 50 years of Age, or at leaſt ſo many years elder than 40 as Law requires to make one *Doli Capacem*. Immemorial Preſcription, according to *Duaren*, (*g*) is circumſcrib'd by the courſe of 100 years: But in *Molina*'s Opinion, (*h*) no poſſeſſion ſhould be called immemorial,

(a) *November* 29: 1678: *Birnie contra the Earl of Nithſdale and his Tenents.* (b) *February* 11: 1665: *Scot of Thirleſtane contra Scot of Broadmeadow.* (c) *February* 15: 1631: *Bryce, Temple, and Schaw, againſt Brown: December* 13: 1664: *Biſhop of the Iſles contra James Hamiltoun.* (d) *June* 30: 1668: *Miniſter of Elgin contra his Pariſhioners.* (e) *November* 24: 1665: *Biſhop of the Iſles contra Fiſhers of Greenock.* (f) *De Decimis, Quæſt:* 13: *N:* 99. (g) *Conſuetud: Feud: Cap:* 5: *N:* 7. (h) *De Juſtitia & Jure, Tom:* 1: *Diſput:* 76: *in prin*

morial,

morial, if it be remembred, that the ſame had a beginning within 100 years, altho the preciſe Term on't be forgot and out of mind.

13. The Lords once indeed made a Diſtinction betwixt Vicarage commonly payed throughout the whole Kingdom, as of Stirk, Lamb and Wool, and the Vicarage of Milk and other particulars; finding the latter, and not the former, liable to Preſcription. (*a*) But thereafter, (*b*) upon a Reclaiming Bill, the foreſaid Interloquitor was ſtop't. Preſcription of a Right to Tithes of one ſort of Fruits, will not carry a Right to theſe of a new and different product, that was not formerly Tithable. (*c*) Except where the Heretor doth plainly alter the Uſe of his Ground *in Fraudem* or *Emulationem* of the Titular of the Tithes. And if one has Right to the Teind Fiſh taken in a certain Bay, and they ſhall happen to leave that place of their old Haunt, and be fiſh'd up in ſome other Creek, where no Fiſhing had formerly been uſual: It were hard to ſay, that the Teind Maſters Right could there take effect. I know it was pled for the Biſhop of the Iſles againſt the Fiſhers of *Greenock*, (*d*) that he having Right to the Teind of all Fiſh taken within his Dioceſe, Poſſeſſion, as in a Barony, of uplifting the ſame in one part, ſhould maintain the Right

(a) *June* 16: 1666: *Miniſter of* *againſt Lord Elphinſton.* (b) *June* 21: *the ſaid Year.* (c) *Arg: Dec: June* 9: 1676: *Burnet contra Gibb.* (d) *November* 24: 1665.

to do so every where else throughout the Benefice. But this Alledgeance was Repelled and taken off by the Fishers their founding upon the Negative Prescription, as to the Teind of Fishes taken in a particular place. Nor was a Ministers being in use to receive a certain kind of Vicarage from some of his Parishioners, sustain'd relevant to subject the rest of the Benefice to the like payment. (*a*)

14. Having by this time sufficiently explain'd the different Rights of Tithes, and how they are acquired and extinguished: The Burdens affecting them shall be the Subject of our next Enquiry.

(a) *November* 28: 1676: *Sheil contra the Parishioners of Prestounhaugh.*

CHAP. VII.

Concerning the Burdens that Teinds are liable to.

UNDER the Law, a Tithe was pay'd out of the *Levites* Tithe to the Priests, called *Decima Decimarum*, which the Pope now layes Claim to where his Authority weighs. And in the *26th* year of King *Henry* the *8ths* Reign, the *English* Clergy were Cess'd in a *Tenth* of their Tithes to the Crown. Which Burden they have ever since lyen under, till

of late Her Majesty Queen *Anne*, by a Generous Act of Royal Bounty hath not only been pleas'd to remit the poor *English* Clergy all Arrears of these *Tenths*; But also to Consecrate that Ecclesiastical Branch of Her Revenue, for a perpetual Augmentation of small Vicarages, and other insufficient Cures.

2. The Burdens that Teinds are Affectable with among us, are either Legal, or Conventional.

3. The King's Annuity of *Six* of every Hundred *Merks* of Teind converted in Money; Ten *shilling* for each Boll of the best Teind Wheat; Eight *shilling* for the best Bear; Six *shilling* for Oats, Meal, Pease, and Rye; three *shilling* where Oats do not render above half Meal; and proportionally less, when the Victual is of inferior goodness: This Annuity I say, is a Legal Burden upon all Teinds, except *Decimæ inclusæ*, and those belonging to Bishops, Ministers, Colledges, Hospitals, and other pious uses. (*a*) Sir. G. *Mackenzie*, (*b*) Say's, it was found to be *Debitum fundi*, because the 15 *Act* of *Parliament* 1633, gave the King Right to bygone and future Annuities. But yet this Annuity seems to be no more *Debitum fundi*, than Tithes themselves are. For when our Law design's to make any thing *Debitum fundi*, and to Oblige singular Successors, it uses expresly to be Declar'd that singular Successors shall be lyable. As to

(a) *Act* 15. *Parl.* 1. *Char.* 1. (b) *Observs. on the said* 15 *Act.*

the

the Clauſe in the Statute, Ordaining payment to his Majeſtie, of Annuity for years paſt, and to come; That muſt be underſtood in a habile ſenſe, ſo as to make Intrometters only with the Teinds of bygone years lyable for bygone Annuities. The Surrenderers did not ſubmit the Tithes of their own Property: and yet theſe were lyable to the Annuity; which was payable whether the Teinds were ſold or not; (*a*) And out of Unvalued as well as Valued Teinds. (*b*) When the Tithes were only valued, the Titular was bound for it; and the Heretor after a Sale. (*c*) And where Tithes payed to Burrows for maintaining of Miniſters, Regents of Colledges, School-maſters, and Hoſpitals, exceeded what was Expended for theſe pious Uſes; the Burrows were obliged to ſatisfie the Kings Annuity out of the *Superplus.* (*d*) When any Titular acquired Right to the Annuity of his Tithes, the Right of Annuity became extinct: *Quia res ſua nemini ſervit.* And therefore a Diſpoſition of Tithes, from one having alſo Right to the Annuity, was found to carry the Tithes free of Annuity, altho the ſame was not expreſt in the Diſpoſition. (*e*)

4. Miniſters Stipends and Augmentations are another Legal Burden, and the main one, to which Teinds are liable: againſt which no Right or Title whatſoever can Secure.

(a) *Act* 17 *of the ſaid Parliament.* (b) *Act* 15. *Ibid.* (c) 16 *March* 1632. (d) *Decreet upon the Burrows Submiſſion.* (e) *Forreſter of Logie againſt Wordie of Cambuſbarron and his Tenents.*

And the truth is, till once the Pariſh Miniſter is ſufficiently provided, no perſon can ſafely buy his own Teinds. For they are always ſubject to be evicted for that end, by the common Law, and our Cuſtom; even after the Heretor has bought 'em: unleſs there be free Teind in the Titulars hand, in which caſe he muſt relieve the Heretor; (a) tho that could not be required of a Tackſman. (b) Nor is a Tack of Teinds or a Penſion out of 'em to be Affected with the Miniſters proviſion, ſo long as the Titular has any free Teind within the Pariſh. Sometimes the Commiſſion declares Heretors free of all farther Augmentation, as when a great Stipend is impoſed for the Miniſter.

5. Where all the Teinds of a Pariſh were under Tack, and the Tack-duty leſs than did ſuffice to make up the Miniſters Stipend; the Commiſſion us'd to raiſe the Tack-duties; and to recompence the Tackſmen, for the Loſs and prejudice ſuſtained by the Burden impoſed, were impower'd to Renew or Prorogate their Tacks even to a longer time than the Titular himſelf could have ſet by Law. (c) A Decreet of Prorogation requires neither Summonds nor Execution for its Warrand. In the year 1649, the Burden of Augmentations being caſt upon diverſe Tackſmen, of Teinds without any Recompence made to them in conſideration thereof, and Prorogati-

(a) *February* 8. *and* 15. 1643. (b) *January* 27. 1635. (c) *Act* 4. *Parl.* 22. *Ja.* 6.

ons

ons in Favours of others, having been loſt during the Troubles : the Commiſſion 1661, were Authoriz'd to grant Recompence and Prorogation to theſe Tackſmen, according to the Rule preſcribed by the Commiſſion 1617; the Titulars being always cited thereto. (*a*) Sir *Robert Hepburn* of *Keith*, who was both Patron of the Pariſh-Church, and Tackſman of his own Teinds being Decerned in 1650, to pay to the Miniſter an Augmentation of 81 *lib.* 12 *Bolls*, 2 *Firlots* of Victual, over and above the former Tack-duty, he got a Prorogation of *ten* 19 years added to his Tack, to begin at expiring thereof. (*b*) Sir *Robert Hepburn* of *Myrtoun*, who had Tacks of his own Teinds, from the Chanter and Sub-chanter of *Murray*, with Conſent of the Biſhop, Dean and Chapter, having freely given off a Manſe and Glebe to the Church of *Kinloſs* with an Augmentation of the Old Stipend, got three Liferents, and three Nineteen years added to his Tacks. (*c*) An Augmentation being impos'd in Favours of the Miniſter of *Aberlady* of a Boll, 3 Firlots of Victual, and 16 *lib.* of Money upon the Earl of *Haddingtouns* Teinds within that Pariſh, 19 Bolls, and 143 *lib.* upon the Lord *Elibank's*, 28 Bolls, and 143 *lib.* upon the Lord *Gosfoord's*, and 15 Bolls, and 104 *lib.* upon the Teinds of the Laird of *Luffnes* : In contemplation whereof, all of

(a) *Act* 61. *Parl.* 1. *Char.* 2. (b) 5 *February* 1662. *Hepburn of Keith againſt Calderwood.* (c) 26 *February* 1662.

'em got Prorogations for the ſame ſpace of five Nineteen years of their Tacks of the Parſonage Teind, and ſeven Nineteen years of their Tacks of the Vicarage; altho their Proportions of the Augmentation differ'd. (*a*) A *Bill* reclaiming againſt the foreſaid Augmentation made to the Miniſter of *Aberlady*, being given in to the Commiſſion by the Patron, Repreſenting that the Miniſter had already Nine Chalders of Victual, which is more than the Legal *quota* of Stipend, and that the Augmentation was deſign'd but as a Blind to furniſh ſome colourable pretence for a Prorogation of the Heretors Tacks, whereby not only he as Patron would be prejudg'd, but alſo the ſucceeding Miniſters cut off, from the Right to them as Parſons after expyring of the Tacks; and craving a ſtop to the Decreet till he ſaw the Proceſs, and was heard to debate why no Augmentation could be granted: The deſire of the Petition was refus'd, in regard no part of the Augmentation was impos'd upon the Patron, nor any ſufficient Intereſt produced by him to hinder the Augmentation. (*b*) Many others who, at preſent, for Brevities ſake, ſhall be nameleſs, obtained alſo Prorogations of their Tacks, in Recompence of Augmentations, and new Proviſions to Miniſters impos'd upon them. In the caſe of Augmentations and other Burdens ſuſtained by Titulars, the Com-

(a) 30 *July* 1673. (b) 30 *July* 1673. *Mackgie Miniſter at Aberlady againſt his Pariſhioners.*

miſſions

missions 1661, and 1663, got Power to Augment proportionally, the Rates for Valuing and buying of Teinds, appointed by the Parliament 1633.

6. Teinds not Heretably Disponed belong now to Patrons in Lieu of their former Right of presenting Ministers: but with the Burden of Tacks and Ministers Provisions or Augmentations; even of two Ministers in one Parish if the Commission think fit. (*a*)

7. Tithes according to the Canon Law must be payed off the whole Head before exacting of Cess or Tribute-Money. (*b*) But in *Scotland*, free Teinds pay Cess as well as the Land. The Teinds of the Parish of *Lilliesleaf* being valued by the Commissioners of Supplie, at 1257 *lib.* 13 *sh.* 4 *d.* according to which Valuation, the Earl of *Roxburgh* as Titular was Cess'd for the same; and several of the Heretors having obtain'd Decreets of Valuation and Sale; the Earl pursued them for his Relief of the Cess, and publick Burdens impos'd upon these Teinds since the Sale.

8. Conventional Burdens affecting Teinds are Pensions, Annuities, Thirlage, and the like. I have cleared up the Nature of Pensions, *Part* 1. *chap.* 8. *Sect.* 3. As for Annuities, if the Teinds out of which the same is payable, come to be evicted by a Supervenient Decreet of Locality in Favours of a Mini-

(a) *Act* 23. *Sess.* 2. *Act* 26. *Sess.* 4. *Parl. W. and M.*
(b) *C. cum non sit* 33 *vers. Statuimus Extr. de decimis Carpzov. Jurisprud. consist. lib.* 1. *tit.* 8. *def.* 136. *n.* 1. *Zoes, in decretal. lib.* 3. *tit.* 3. *cap.* 1. *n.* 12.

ster.

ſter. The Perſon lyable to Warrand the Annuity, muſt make it up out of ſome other Fund. (*a*) And a Lady being provided to ſome Teinds which her Husband was Obliged to make worth ſo much of yearly Rent to her, and two Chalders of Victual out of theſe Teinds being aſſigned by the Commiſſion to the Miniſter: The Husbands Heir was decerned to make up the Rental diminiſh'd by the Miniſters Proviſion; albeit the Teinds continued to be of the ſame Value as before; ſince they were leſs worth to her. (*b*) For a Clauſe obliging to uphold the Rental, would be effectual for Relief, not only in the caſe of eviction *in jure*, but alſo in the caſe of eviction *caſu fortuito* by Inundation, Devaſtation, or the like. (*c*)

9. Thirlage is impoſed on Tithes, either tacitely, or expreſly. Tacitely, as when an Abbot by a Clauſe in his Charter, aſtricted *omnia grana*, which was found to extend to the Teinds then belonging to the Abbot; ſo as to Thirle them, unleſs a Feu-duty were payed, both for Stock and Teind. (*d*) But this Exception of the Teind will not hold in Milns belonging to Chuch-men. (*e*) For as Thirlage is more eaſily ſuſtain'd againſt Church-Lands than others: (*f*) So it is alſo more eaſily conſtitute in Favours of Church-

(a) 19 *June* 1697. *Hume of Linthill againſt Hume of Wedderburn.* (b) 28 *July* 1635. *Lady Cardroſs contra Lord Cardroſs her Son.* (c) *Stair Inſtit. lib.* 2. *tit.* 3. §. 46. (d) *Ibid. tit.* 7. §. 17. (e) *Ibid.* (f) *Ibid.* §. 16. *December* 7. 1665. *Veatch contra Duncan.*

Milns.

Milns. Thirlage of Land to another Man's Miln, doth not infer a Thirlage of the Teind thereof acquired afterwards by the Heretor who Thirled the Lands. (*a*) For the posterior acquisition was not intended to add any Benefit to him who had the Right of Thirlage, and to Subject the Purchaser to a heavier Servitude. Nor was it regarded that the rest of the Heretors of the Lands astricted did grind their Teinds at the Thirle-Min: Since their voluntar Deed could not put a Tye upon others. Nor was long Possession in *molendino regio*, of receiving Multures for all Corns of a Barony promiscuously without exception of Teind, found to bring the Teind under a Thirlage, Except such as tholed Fire and Water there. (*b*) For albeit long Possession may suffice to Thirle the Kings own Barony; yet other mens Rights of their Lands and Teinds can not be Thirled without their Consent. But 40 years payment of Multure, conform to a Clause in a Charter astricting *omnia grana crescentia* without exception of Teind; was sustained relevant to subject the Teind to a Thirlage. (*c*)

10. Having discuss'd the different Rights of Tithes, and the Burdens affecting them: we shall shew in the nixt place, how they are made Effectual by payment.

(a) *July* 7. 1635. *L. of Innerweik contra Hamiltoun.* (b) *January* 8. 1662. *Stuart contra Feuars of Aberledno.* (c) *January* 21. 1681. *Grierson contra Gordon.*

CHAP. VIII.

CHAP. VIII.

Concerning the payment of Teinds.

NOTHING hath been the Subject of more Difference and Contention in this Land, than the payment of Tithes. The refusing to pay them hath produced many troublesome and vexatious Law Suits. And the Severity and Rudeness in exacting them, hath occasion'd much Pike and Animosity: Which sometimes broke out into open Acts of Malice of Revenge. *David Straitoun*, as Bishop *Spotswood* (*a*) relates, being offended at the Rigorous Exaction of Teind Fish; gave Order to his Servants to cast every Tenth Fish they took into the Sea, that the Church might go and receive it where the Stock was taken. But some wicked *Caithnes*-Men are reported, for the like cause, to have carried their Resentment farther against their Bishop *Adam*; whom they burnt in his own House, after they had first scourg'd him, and killed his Chamber-Boy. In handling the payment of Tithes, we shall first speak to the Subject Tithable. 2. The manner of payment. 3. The persons to whom Tithes are payable. And, 4. By whom.

(a) *Hist: of the Church of Scotland, Page 66.*

SECTION

SECTION I.

Of what things Tithes are due?

THE Clergy not contenting themſelves with the Predial Tithes enjoin'd by *Moſes* Law, Perſonal Tithes came to be exacted; and about the end of the Twelfth Century Tithe was claim'd for Hunting, Honey, Trade, not excepting the Commerce of Whores; and if *Spanhem* may be credited, (*a*) the very Alms of the Poor was ſubjected to Tithing. And as the Canon Law grew into Authority with us: So in the 25 Statute of that Provincial Council held in *Scotland* in the Year 1225 under Pope *Honorius* 3. (*b*) Tithe was ordained to be payed of all things *quæ Innovantur* as Corn, Hay, Lint, Gardens, Milns, Fiſhings, Hunting, the Brood of Animals, Wool, Milk, Cheeſe, Chickens, Eggs, Trade, *Silva Cædua*, or Woods us'd to be cut, Fruits of Trees, and the like.

2. The Doctors are never more confuſed and indiſtinct, than in what they write concerning the Subject Tithable: And their greateſt Difficulty hath been about ſmall Tithes, which are the common Endowment of Vicarages. In determining what things come under theſe, Lawyers do mightily clath

(a) *Oper: Theolog: Part* 1: *Obſerv: in Cap:* 27: *Levit: in fin.*
(b) *Vid: Ch:* 3: *N:* 3.

and

and perplex themſelves, but they attribute much to Cuſtom in that Matter, and think, that if the Tithes of Corn and Hay only are expreſly provided to the Parſon by the Foundation, then all the reſt falls to the Vicar. Some tell us, Tithes ought to be payed out of all the Fruits of the Ground. (a) But the moſt part hold it for a general Rule, that Tithes are only to be payed of things that do annually increaſe. (b) From whence my Lord *Coke* (c) concludes, that no Tithes are to be payed of Minerals, or what is of the Subſtance of the Earth, ſuch as Stone, Turff, Tinn, Lead, Coal, Chalk: But at the ſame time (d) he grants, that by Cuſtom a perſon may have Tithes of ſuch things as are not Tithable of common Right. Others expreſly maintain, that Mines and Quarries pay Tithes (e) It would ſeem conſequential from the foreſaid Rule, that no Tithes can be due for Houſes, theſe having no Annual Increaſe; nor yet for Saffron, whoſe Heads are gathered but once in Three Years; nor of *Silva Cædua*, which perhaps will ſtand 20 Years before it be cut. But as to theſe, and ſeveral other Tithable Subjects, the *Engliſh* Lawyers vary mightily in their Deciſions. They nicely diſtinguiſh betwixt Timber and other Trees, al-

(a) *Rebuff. de Decimis, Qu:* 8: *N:* 3: 8: *Barboſa de Officio & Poteſtate Paroch: Part* 3: *Cap:* 28: § 1. *N:* 1: *Zoeſ: in Decretal: Lib:* 3: *Tit:* 30: *Cap:* 1: *prin.* (b) *S: Simon Degge Parſons Counſellor Part* 2: *Ch.* 3: *Shepherds Parſons Guide, Chap:* 5: *princ: Stillingfleets Eccleſiaſtical Caſes, Pag:* 183. (c) 2: *Inſtit:* 651: *Select Caſes* 16. (d) *Ibid: Pag:* 664. (e) *Rebuff: Quæſt:* 8: *N:* 23: *Monet: Cap:* 4: *N:* 33, 34.

lowing

lowing the former only to be Tithe-free. They will have a kind of Tithe to be due for Houſes in *London*, and no where elſe. They tell us, that if a Wood be Grubbed, Ploughed and Sown with Corn, it pays Tithe preſently; but that any barren Heath or waſte Ground being brought in and Cultivate with great Charges, muſt pay no Tithe for Seven Years, but only the Tithe it payed formerly. And yet they teach, that Fenny Land drained, or Land gained from the Sea with much Expenſe, and turn'd to Arable, doth pay Tithe. They don't allow Tithe, except a perſonal one, for old Corn Milns, which never payed formerly, but ſubject new Corn Milns and other publick Milns to Tithing. And yet Sir *Edward Coke* (*a*) ſays, it was never judicially determined, that he knows of, whether any Tithes are due for Milns or not?

3. Its another Rule of Law among the Doctors, that things *Feræ Naturæ*, or wild by Nature, are not Tithable, unleſs they are tamed and keep'd under cuſtody, and ſo become a Mans Property: As Bees gone into ſeveral Hives belonging to particular perſons, Pigeons in a Dove-Houſe, Fiſhes in a Pond, and Rabbets in a Cunningair; for all which they tell us Tithe is due. (*b*)

4. No Tithe is due, according to the *Engliſh* Lawyers, for Graſs, upon which profitable

(a) 2: *Inſtit*: 622: *Littl*: *Rep.* (b) *Stillingfleet Ibid*: *Pag*: 188, 189: *Rebuff*: *de Decimis*, *Qu*: 8: *N*: 10: *A*: *Moneta cum Auctar*: *J*: *Mon*: *Brev*: *de Decimis*, *Cap*: 5; *P*: 282: *Degge Ibid*: *Chap*: 8; *Shepherd Ibid*: *Sect*: 7.

Cattel

Cattel are fed, such as Work Beasts, or those that give Milk ; because they are either advantageous to the Teind Master in Labouring the Ground, or afford a different Tithe; nor yet is there any Tithe to be claim'd for the Pasture of a Mans own Saddle Horses: But there is a certain rate payable for the Herbage or Agistment of barren Cattel. (*a*) They allow no Tithe for Beasts or Birds of Pleasure without Profit, such as Haulks, Hounds, Apes, Thrushes, Popping-Jays, and the like. (*b*)

5. But now with us Personal *Tithes* take no place. (*c*) And the payment of Predial *Tithes* is much regulated and determined by Local Custom. For Hay, Lint, Hemp, Stags, Swine, Eggs and Fruit are some where *Tithable*, in other places not; in some places again, and not in others, the *Teind* Fish is claim'd, and not always after the same manner. No Tithe ought to be payed for Fishes taken *in alto Mari*: (*d*) The Sea being among those things that are common to all. (*e*) But then *Tithe* for these is exacted by the Heretor upon whose Ground the Boats Land by vertue of their Landing. Generally Corns, Stirks, Lambs, and Wool are every where *Teinded*: (*f*) But Kail, Herbs and Roots no where in *Scotland* that I know ; and were found not Teindable.

(a) *Degge Ibid: Chap.* 5: *Shepherd Ibid: Sect:* 3: & 4: *Hughs Parsons Law, Chap:* 25. (b) *Degge Ibid: Chap:* 12: *Shepherd Ibid: Sect:* 7: *Hughs Ibid.* (c) *Stair Instit: Lib:* 2: *Tit:* 8: § 6. (d) *Espeisses des Benefices Ecclesiastiques, T:* 11: *Sect:* 4: *N:* 2. (e) § 1: *Instit: de Rerum Divisione.* (f) *June* 16: 1666: *Minister of* *contra Lord Elphingstoun, Stair Ibid.*

(*a*) Nor

(*a*) Nor are Garden Fruits Teindable in many places abroad, unleſs when the Proprietar ſells them. (*b*) Becauſe Gardens are ordinarly contrived either for Pleaſure, or for the neceſſary Uſe of the Proprietar. Vicarage is ordinarly pay'd for Cows and Sheep: But not for Horſes or Mares, or any Yeld Goods, except out of their Graſs Meal. But in a word, 'tis altogether Local. (*c*) Being introduc'd by no poſitive Law, but only by Cuſtom: And therefore he who purſues for Vicarage of any kind, muſt prove former Uſe of payment. (*d*) By the Civil Law, where a Cuſtom is doubtful and uncertain, the Matter ſhould be rul'd by the Cuſtom of Neighbouring places. (*e*) But what is payed for Vicarage in one Pariſh, ought not to be a Rule to thoſe in the Neighbour-pariſh: Since there is ſometimes a different Vicarage-tithe payed in different places of the ſame Pariſh. Miniſters Glebes are Teind-free, whether they conſiſt of Arable-land; (*f*) or of ſixteen Soums Graſs. (*g*) Which Priviledge is not only competent to Glebes of Churches eſtabliſhed by Authority; but alſo to Glebes voluntarly mortified to Chappels where Divine Service is uſually performed. (*h*) By the Law of *England* a Vicar is only free from paying Tithe for his Glebe to the Parſon Impropriate, ſo long as he keeps it in his own hands: But if

(*a*) *June* 9. 1676. *Burnet contra Gibb.* (b) *Eſpeiſſes Ibid N.* 3. (c) *Vid: ſupra cap: 5. N.* 9. (d) *June* 30. 1668. *Miniſter of Elgin contra his Pariſhioners.* (e) *L.* 34. *ff. de Reg: Juris.* (f) *Act* 62. *Parl:* 5. *Ja.* 6. (g) *Act* 10. *Parl:* 23. *Ja:* 6. (h) 9. *June* 1676. *Burnet contra Gibb.* he

he let it out to another, the Tackſman is lyable to the Tithe. And a Parſon impropriate pays no Tithe for his Glebe while poſſeſt by himſelf, but a Purchaſer or Tenent has no pretence to the Exemption. (a) But with us Miniſters Glebes were found Teind-free even after they were out of their poſſeſſion, and paſs'd into Laymens hands: Unleſs it could be inſtructed that the Laick Poſſeſſor pay'd Teind within Fourty years for the Glebe come in his hand. (b) Tithes are due out of the Fruits of *Novalia*, (c) but not by Preſcription of a Right to the Tithes of the laboured Ground. (d) Change of Grain, or the inverting the uſe of Ground, doth ſometimes alter the Tithe, and ſometimes extinguiſh it. (e) One thing ought not to be twice tithed in one year. (f) But if there be two Cropts in the year, as *Strabo* ſays there is in *India*; (g) a Tithe will be due out of each of 'em. (h) No Tithe can be requir'd for After-maths of Meadows, or Baulks in Corn-fields, or the Stubble of Corn. (i) Tho Corn and Hay Growing in Orchyards, are ſubject to Tithing as well as the Fruit thereof. (k)

(a) *Shepherd Parſons Guide ch: 9. ſect: 3. N 6 & 7:* (b) *Mackenzie Obſerv on the 62 Act 5 Parl: Ja: 6.* (c) *Caniſ: de decimis cap: 11. N. 2. Eſpeiſſes Ibid. Tit: 10. ſect: 1. N. 9. Bruneman de jure Eccleſiaſt: lib: 2. cap: 6. N. 9.* (d) *Ibid:* (e) *Vide infra ſect: 3. N. 5.* (f) *Hughs Parſons Law, chap: 25.* (g) *Lib: 15.* (h) *C. ex parte 21. Extr: de decimis Rebuff. de decimis Q. 18. N 7. Carpzov: juriſp: conſiſt: lib: 1. tit: 8. Def: 131. N. 7. Degge Parſons Counſellor. part 2 cap: 3. Eſpeiſſes Ibid. ſect: 4. N. 1.* (i) *Degge Ibid: Shepherd Parſons Guide, chap: 5. ſect: 4. Hughs Ibid.* (k) *Degge Ibid: Shepherd Ibid.*

SECT.

SECT. II.

In what manner Tithes are to be payed?

THE manner of paying Tithes is ruled by the Cuſtom of the Place: (*a*) And reſolves in the diſtinct Heads of Matter, Time, and Place. Which we ſhall conſider in order as they ly.

I.

The Matter of Tithes, or what is to be payed in name of Tithe.

THE *Quota* of Tithe hath varied in different Places. In ſome it is the thirty part of the annual Increaſe, and in others the twenty; ſome people make it a twelfth, others the eight part: But generally the Tithe is conſidered as the tenth Proportion. 'Tis a general Rule in payment of all kind of Tithe, that neither the beſt nor the worſt of the Fruit ſhould be given for it. (*b*) We ſhall firſt conſider what is pay'd for Vicarage, and then what is pay'd for Parſonage-Tithes.

(a) *Degge Ibidem. Shepherd Parſons Guide. chap: 6. Pr.*
(b) *Arg: lev: cap:* 27. *v.* 32, *&* 33. *Rebuff* Q. 6. *N.* 29. Q. 11. *N.* 1. *Hiſpan:* Q. 14. *N.* 17.

2. The Tithe of Bees is the Tenth of their Honey, or Wax. (*a*) The Tithe of all tame and domeſtick Fowl is to be pay'd in their Eggs, or Young in their proper kind, according to the cuſtom of the Place. But where they pay Tithe of Eggs, there is no Tithe of the Young; Nor *e contra* Tithe-eggs payed where the Young is tithed. (*b*) When we ſpeak of the Tithe of Milns, Quarries, and Mines, the meaning is not that every tenth Stone of a Quarry ſhould go for the Tithe; But only the tenth part of the Profits thereof. (*c*) So the *Miln-Tithe* is the tenth of the Multure or what is given for Grinding, (*d*) or the Tenth-toll-diſh; if the cuſtom of the place hath not otherwiſe determined. (*e*) For as Vicarage-tithes were only introduc'd by cuſtom; ſo they are altogether regulated by it as to the matter and manner of payment.

3. Parſonage-tithe is either drawn *ipſa corpora*, or valued Bolls are payed conform to Rentals, or Decreets of Valuation.

4. Where one has Right to draw the *Ipſa corpora*, he muſt have them *in palea*. (*f*) And unmixed of the ſame Goodneſs as they came off the Ground, and cannot be oblig'd to take Corns of a Forein Growth for his Teind. (*g*) Tho then the Teind is caſual, more or leſs, ac-

(a) *Shepherd Ibid: ſect:* 2. (b) *Degge Ibid: chap:* 11. (c) *Rebuff. Q.* 8. *N.* 23 *Monet: cap:* 4. *N,* 33, 34. (d) *C. Extranſmiſſa* 23. *Extr: de decimis Rebuff. Ibid: N.* 6. *Monet: Ibid: N.* 35. (e) *Shepherd Ibid: ſect:* 1. *Degge Ibid: chap:* 9. (f) *G. Tholoſani ſyntag: part:* 1. *lib:* 2. *chap:* 26. *N:* 2. (g) *Carpzov: Juriſpr: conſiſt: lib:* 1. *tit:* 8. *Def:* 126. *Eſpeiſſes des Benefices Eccleſ: tit:* 10. *ſect:* 2. § 2.

cording

cording to the Plenty or Scarcity of the Cropt, and nothing at all, if there be an entire Sterility.

5. Rental-teind Bolls are pay'd when the Teind hath been tax'd to so many Bolls yearly, either by an expres Rental, or tacitely by old use of payment. Rental Bolls were found due tho exceeding the Teind of the Cropt: (*a*) Altho the Pursuer of a Spuilzie would get no more than the proven Quantity of true Teind.

6. Use of payment imports a verbal Tack, and defends *per tacitam relocationem*, until Interruption by Citation or Inhibition. (*b*) Yea, use of paying an inconsiderable Duty to the Minister who had ceased to be Titular, was found to regulate the payment to the true Titular till Interruption. (*c*) But payment to a Minister who had an Assignation to the whole Parsonage-teind, relative to a Decreet of Locality, wherein some Chalders of Victual out of the Teind were modified for his Stipend, was found not to infer tacite Relocation: So as to hinder the Titular to claim the Teind remaining over what was pay'd to the Minister. (*d*)

7. Valued-teind-Bolls in my Opinion may be satisfied in Corn which grew upon another Ground; the determined Quantity and Qua-

(a) *March* 22. 1626. *Lennox of Brianshogle contra Tenents of Balfron* (b) 28. *November* 1676. *Sheil contra Parishioners of Prestounhaugh.* (c) 19. *January* 1669. *Earl of Athole contra Robertson of Strowan* (d) 30. *June* 1698. *Sir William Bruce against Sir David Arnot.*

lity being obſerv'd. For as the Titular cannot compell the Heretor to ſow his own Ground, he can as little pretend to have his valued Duty only out of the Product thereof. I find ſome Debate whether valued Bolls ought to be pay'd according to the heaped Meaſure, or the *Modius æquatus*? The common Opinion reſolves in this, that Uſe and Wont ſhould be the Rule. (a) *Tolerabilia enim cenſentur quæ vetus comprobat conſuetudo*: (b) *quæ obtinet vim veritatis*; (c) *Et dirigit ac informat omnes actus mundi.* (d) But that if no certain Cuſtom appear, we muſt own and acquieſce in the ſtraiked Meaſure, as that which is more univerſally received. (e) With us valued Bolls ſhould be delivered according to the Meaſure of *Linlithgow*; (f) where the Standart of the Firlot is kept. And by an Act of the Commiſſion of Parliament, 19. *February* 1618, all Grain was ordained to be met by Straik. The liquid price of bygone Teind-bolls is the Sheriff-fiars of the reſpective years. (g)

8. Valued Bolls in a Decreet of Valuation will not be due if the Land ly waſte, and there be no Crop: For the valued Teind-duty is only *Debitum Fructus*, and not *Debitum Fundi.* (h) The Valu'd-duty is indeed the

(a) *Carpzov: juriſprud: conſiſt: lib:* 1. *tit:* 8. *Def:* 127. *N.* 4. (b) *L.* 13. § 1. *ff. de pollicit.* (c) *L* 1 *C. de ſervitutibus & aqua. Gail: Obſerv* 88. *N* 7. (d) *A. Faber Cod: lib:* 4. *tit:* 7. *Def:* 21 (e) *Carpzov: Ibid: N* 6. *& ſeqq.* (f) 29. *May* 1627. *Act of Commiſſion.* (g) 14 *July* 1704. *Bothwel of Glencorſe againſt Porterfield of Comiſtoun and his Tenents.* (h) 20. *February* 1662, *Gallendr againſt Monro.*

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fix'd Standart for payment *communibus annis*; and as the Titular gets no more in name of Teind, however plentiful the Cropt is, he gets no leſs be it never ſo bad: But if there were no Produce, or nothing of a Crop, there could be no claim for a Valued-duty, more than for the Drawn-teind when there is nothing to draw. Nor can the Valued-duty be exacted from any, ſave only the Poſſeſſors, and Intrometters with the Rents for the time: Unleſs it be ſecur'd by Infeftment, conform to the Act of Commiſſion, the *6th.* of *Auguſt* 1630; which ſeldom, if ever, is done. (*a*)

9. The drawing of Teind in *ipſis corporibus* may be interrupted by the payment for ſome years of Rental, or valued-bolls: And theſe may be interrupted, either expreſly by Tacks for a definite time; Or Tacitly by contrary uſe of payment, whereby even the Teind-duty contain'd in Decreets of Valuation may be interrupted. But all theſe Interruptions have not quite the ſame Effect: For uſe of payment doth no longer interrupt the drawing of Teind, or payment of the Duty contain'd in Decreets of Valuation, than till the Interruption is taken off, either by the Titular's requiring, or the Heretor's offering *debito tempore* the *ipſa corpora*, or the valued Duty in the Decreet. So, a perſon was allowed to free himſelf in time coming of a certain Quantity of Teind-Bolls, for which he had been formerly decerned in ſeveral Decreets, by making offer of the Teind in

(a) *Vide, Infr: chap:* 9. *ſect:* 3. *N.* 11.

kind. (a) Rental-bolls were no longer found due, than till the *ipsa corpora* were offered, and Intimation made to the Teind-master, that the payment of that Quantity would be no longer continued. (b) And voluntary payment of more Bolls in name of Teind for the space of seven years than was due by a Decreet of Valuation, was found not to oblige in time coming. (c) More than a Vassal who for diverse years pays a greater Feu-duty than is contain'd in his Infeftment, can be forc'd to pay always that higher Duty. But Rentals being once interrupted by contrary use of payment, and that use of payment Re-interrupted by Citation or Inhibition; the Heretors will find themselves lyable thereafter for the full Teind; And it will not be sufficient to offer the old Rental-bolls. (d) But yet a Minister and his Predecessors in Office, having been in use to receive a precise number of Teind-bolls yearly for thirty years conform to Discharges produced, which did compleat his Stipend modified by Decreet of Plantation, was not debarred from seeking a larger Quantity by vertue of an Assignment from the Bishop for years after the use of payment was interrupted: He the Minister proving that his Prede-

(a) *February* 20. 1633. *Colledge of Glasgow against Stuart.* (b) *March* 22. 1626. *Lennox of Branshogle against the Tenents of Balfron* (c) *Gilmoir Decis*: 36 *L. of Bassenden against Bells, February* 1662 (d) *December* 12. 1679. *Colledge of Aberdeen against the Town.*

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ceſſors had received payment of the ſaid greater Quantity according to an old Rental. (*a*)

II.

The time when Tithes are to be payed.

PErſonal-Tithes, according to the Canoniſts, ſhould be pay'd at the years end; and Predial-tithes *collectis ſtatim fructibus.* (*b*) The Tithe of Calves and Lambs ſhould be pay'd after they are weaned from Sucking. (*c*) The Doctors will have Tithes to be pay'd before they be ſought. (*d*) But as to Parſonage-teind, it would infer a Spuilzie in our Law, if the Heretor ſhould at his own hand ſeparate the ſame from the Stock, without previouſly requiring the Titular or Tackſ-man to do it.

2. Theſe who had Right to Parſonage-teind frequently delaying to draw it in due time, Land-labourers were reduc'd to a grievous alternative Strait, of either ſuffering their Corns to rot upon the Ground, to gratifie the Humour and Malice of an Oppreſſor; or to run the hazard of a Spuilzie. In order to a Remedy of this Grievance and Inconveniency, ſeveral Acts of Parliament have been made for regulating the time of Teinding: (*e*) But the

(a) *July* 3. 1630. *Seymour contra L. Balgillo.* (b) *G. Tholoſ: ſyntag: jur: part* 1. *lib:* 2. *cap:* 26. *N.* 3. (c) *Rebuff. Q.* 6. *N.* 3. 30, 31. *Barboſ: collect: doctor: in lib:* 3. *decretal, tit:* 30. *C. cum homines* 7. *N.* 5. *Shepherd Parſons Guide, chap:* 6. *ſect:* 2. (d) *Rebuff. Q.* 12. N. 7. *& ſeqq:* (e) *Act* 73. *Parl:* 6. *Act* 48. *Parl:* 11. *Act* 8. *Parl:* 18. *Act* 5. *Parl:* 21. *Act* 9. *Parl:* 22. *Ja:* 6.

preſent

preſent ſtanding Rule, is that preſcribed in the *9 Act, 22 Parl. Ja. 6.* whereby all former Methods are innovated and altered. It ordains the Owner of the Teinds, if he dwell out of the Pariſh, to appoint a Factor within the ſame, or ſome adjacent Clachan, and to intimate publickly his Name & particular place of Reſidence the laſt Sunday of *July*, or firſt Sunday of *Auguſt*, and that Teinding (if the Poſſeſſor pleaſes) may be at three times, once for the Croft or In field-corn, another time for the Out field, and a third time for the Bear. Who may eight days after compleat ſhearing of each Sort, or at leaſt about nine parts thereof, require the Teind-maſter at his dwelling place, if it be within the Pariſh, and if not, his Factor, either perſonally, or by intimation to the Miniſter, or at the Factor's place of Reſidence, to come and draw the Teind within four days. Wherein, if they fail, or if the Owner of the Teind, being an Out-dweller, hath not ſettled a Factor for him, in the Terms above-mentioned; the Poſſeſſor may ſafely, in either caſe, Teind his own Corn, and carry away the Stock, leaving the ſeparate Teind upon the Ground: Which he is obliged to preſerve, and keep skaithleſs, for the ſpace of eight days after expyring of the Term of Requiſition, and no longer. And if Teinding proceed while about a tenth part of the Corns is ſtanding un-cut down, the like order of Requiſition is to be us'd as to that, when ſhorn. But to

Legitimate

Legitimate this manner of Teinding by the Poſſeſſor, it muſt be done before Witneſſes. (*a*)

3. Payment of valued Teind-bolls ſhould be made betwixt *Yule* and *Candlemaſs*. (*b*)

III.

The Place where Tithes ought to be pay'd.

TITHES, according to the generality of the Doctors, ſhould be carried home to the Parſons Barn-yard by the Pariſhioners upon their own Charges, where that can be eaſily done. (*c*) Others think this to be unreaſonable, and without Foundation in Law or Cuſtom: (*d*) alledging that all the Tye upon the Owner of Goods lyable to a Teind, is only a Reſtriction, that he cannot carry any of them off, till that be drawn. A third Sort own, that we are to be rul'd in this Matter, according to Cuſtom, which varies in different places. (*e*) It is the Cuſtom of *Antwerp*, where the Teind-corn is us'd to be drawn, to ſeparate the ſame from the Stock, and leave it upon the Ground. This is alſo done in *Bavaria* and the *Upper Palatinate*. But in theſe parts they carry Rental-bolls pay'd inſtead of Teind,

(a) *Stair Inſtit: lib:* 2. *tit:* 8. § 22. (b) 23. *March* 1631. (c) *Covarruv lib:* 1. *var: reſol: cap:* 17. *N.* 8. *verſ:* 8 *Carpzov: juriſprud: Conſiſt: lib:* 1. *Tit.* 8 *Def:* 135 *N.* 5, & 6. (d) *Guid: Pap: Deciſ:* 283. *Adrian: quod lib:* 5. *Art:* 1. §. 2. *Rebuff.* Q. 5. N. 23. *Eſpeiſſes des Benefices Eccleſiaſt: tit:* 10. *ſect:* 2. § 3. (e) *Addit: ad Bruneman: de jure Eccleſ: lib:* 2. *cap:* 6. *N.* 15.

home

home to the Parsons house. What-ever favour in this Matter may be indulg'd to Ministers as to their Teind-bolls, it would seem not unreasonable, that the Titular or Tacksman of other Mens Teinds, should come to the Lands and carry off their Teind after it is drawn; and to the Heretor's Barn, to receive valued Bolls. As a Pensioner of Coals must come to the Coal-hill and receive them, and a Pensioner of Victual to the Barn-door; From whence they must transport their Coals or Corn to their appointed place upon their own Charges. (*a*) The Tithe of Fish should be pay'd at the Water-side. But the causing throw every tenth Fish into the Sea, to put the Teinders to seek their Due where the Stock was taken, (*b*) was an Action savouring more of Malice than Justice.

(a) *February penult:* 1623. *Paip contra L. Wolmet.* (b) *See the beginning of this Chapter.*

SECT. III.

Of the Persons to whom Tithes are payable.

IN time of Popery the Parish Priest as Rector or Parson had a presumptive Title to all the Tithes of his Parish. (*a*) I call it only a presumptive Title, because frequently Parish Churches were appropriate to Monastries and Nunneries, *&c.* Whereby the

(a) *Vid: supr: Chap: 6. sect.* 1.

Convents

Convents claim'd the Parſonage-tithes, and feed Vicars to ſerve in their Room. Who in ſome places had aſſigned for their Maintenance a ſmal pecuniary Stipend, in others the ſmaller Tithes, and in ſome places a Share of the greater Tithes. In that Provincial Council held in *Scotland* under Pope *Honorius* the Third, (*a*) Tithes were ordained to be pay'd *iis ad quos pertinere noſcuntur*, i. e. *Perſonis & Vicariis.*

2. According to the Canon Law, Perſonal Tithes are to be pay'd to the Miniſter of the Pariſh where the Party lives; And Predial-tithes belong to the Incumbent where the Fruits are reaped (*b*) And therefore Tithe-fiſh is not due to the Miniſter of the Pariſh where the Owners & Fiſhers dwell; But to him in whoſe Bounds the Fiſhes are taken; That is, where the Boats ly, or from whence they go for taking, and whither they return for unloading the Fiſh. (*c*) I am informed, that by antient Cuſtom, the Herring-boats all along the Coaſt ſide of *Eaſt-Lothian* and *Merſe*, pay the whole Teind to the Pariſh Miniſter of the Owner of the Boats, when theſe boats land within his Pariſh; and Half-teind when they land elſewhere, and the other Half to the Miniſter within whoſe Precinct they land. But pay no Teind upon the account of Docking and lying in another Pariſh: That being a Priviledge for which the Maſter of the Ground receives

(a) *Cap:* 35. (b) *Vid: ſupr: chap:* 5. *N.* 5 *&* 6. (c) *Sir James Stuart's Notes upon Dirletoun's Doubts, Title, Teind-fiſh.*

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ten Shilling for Anchorage. And this practice ſeems not unreaſonable; for if Fiſhers ſhould be allowed to pay their Tithe where they Dock their Boats, it were eaſie for them to fruſtrate the Stipends of their own Miniſters at their pleaſure, by laying their Boats where they can make the beſt Bargain.

3. The Doctors tell of a Cuſtom ſomewhere received, to pay the Tithe of Milk to that pariſh where it is Milked, and of Cheeſe where it is made, and of the Brood where they are brought forth. (*a*) But where the Tithe of Milk is payed, there is nothing due for Cheeſe made of the other Nine Parts on't; and where the Cheeſe hath been tithed, no Tithe is to be payed for the Milk. (*b*) Becauſe *idem non debet bis decimari.* The Tithe of Animals is due to the Pariſh-Church where they feed. And if they be Summer'd in one, and Winter'd in another Pariſh; or if they feed all the day long in one, and ly during the night in another, in either caſe both pariſhes may claim an equal ſhare of the Tithes. (*c*)

4. But now Tithes not Heretably Diſponed are given to Patrons to compenſe the Reſcinding of their Rights of preſenting Miniſters, but with the Burden of Tacks, and the natural Burdens affecting Teinds, even of two

(a) *Rebuff q 6. Barboſ. de offic. et poteſt. Parochi cap.* 28. §. 1. *n.* 12. G. *Tholoſ: ſyntag: jur: Part* 1. *lib.* 2 *cap:* 25. *n.* 2. (b) *Degge Parſons Counſellor Part* 2. *chap:* 6. *Shepherd Parſons guide chap:* 5. (c) *Rebuff ibid: n.* 15. *& ſeqq:* G. *Tholoſ: Ibid: Barboſ: ibid: Degge ibid: Shepherd ibid: chap:* 7.

Miniſters

Miniſters in one pariſh, if the Commiſſion think fit. So that the ancient Right of the *Parochus* to the Teinds of his own Pariſh, is now reſolved into a Right of Security upon the Patrons Title for a competent modified Stipend.

5. Since the Reformation and Suppreſſion of Monaſtries the Tithes of other mens Lands, which once belonged to them, are now partly payable to Titulars of Erection, or to their Tackſmen; and partly confounded with the Stock, the Heretors having bought them, either voluntarly, or by Order of the High Commiſſion, conform to King *Charles* the firſt's Decreet arbitral. Other Tithes are payed to Burghs Royal for the maintenance of their Miniſters, Colledges, or Hoſpitals.

6. It is an important Queſtion whether he who has Right to receive the Tithes of one kind of Fruits out of Lands, may claim the Tithes of another kind as *Surrogatum*, when the Land is ſown with other Seed, or improven to a different uſe, by being turn'd from Corn to Graſs, or from Graſs to Corn. It would ſeem that he may according to the Canon Law. (*a*) But in order to ſet the Matter in a clearer Light, let us conſider the different Caſes of One having Right to both Parſonage and Vicarage Tithes, and where they belong to diſtinct Titulars. In the firſt caſe, I hold it for a Principle, that the Heretor may *jure dominii* Labour his Ground or

(a) C. *Commiſſum* 4 *extr. de decimis.*

not'

not, and make it produce the Subject of Parsonage or Vicarage Tithe as he thinks fit. (*a*) And the Titular can only claim the Tithe of the present product, if that was formerly in use to pay Tithe: otherwise no Tithe is due. (*b*) Unless it can be made appear that the Heretor industriously so Dispos'd of his Land to Defraud the Titular. But this is not to be presum'd: For we cannot reasonably suppose that any man would out of Envy to the Teind-master prejudge himself, and suffer his Lands to ly Fallow, for Example, if thereby his own Rent would sink and fall. And if he find his Account in converting his Land to Grass Rooms, who can hinder that which is the native effect of Property? Now as the Tithe-master hath not such a Right to the Tithes as to compell the Heretor to Labour his Ground, or to hinder him in the free Excercise of his Property, by making what use of it he thinks fit: so if no Tithe hath been formerly due for the new Improvement; there is no reason to induce an Obligation for it in time coming, upon the account of any Title to the Tithe of a different kind. If the Titular of the Tithes find himself at a Loss by the Heretors arbitrary disposal of his Ground, he may apply to the Commission for Remedy by a Valuation,

(a) *Rebuff. de decimis q. 6. n. 35. Espeisses des benefices tit: 10. sect: 2. n. 5. & 6. Grimaudet au traite des dismes liv: 3. chap: 3. n. 7. 8.* (b) *June 9. 1676. Burnet contra Gib: Stair Instit: lib. 2. tit. 8. §. 31.*

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to fix and liquidate the value of his Tithes for the future. I would alſo incline to think that an Heretor is as much at Liberty in the cultivating and ordering of his Ground, when there are different Pretenders to the Parſonage and Vicarage Tithes, as when one has Right to both. And that he may by inverting the uſe of his Property *bonâ fide*, advantage the one, to the others prejudice, as to the payment of bygone Tithes. But then the Party leſed may ſoon Right himſelf by a Recourſe to the Commiſſion. Who in a Valuation will not Determine the Parſonage or Vicarage by the quantity of Ground that was Paſture, or ſown the year immediately preceeding: ſince that may prove unequal by the Freak of a contentious Heretor. But they will conſider the Total of the Arable and Graſs-Rent for ſeven years backward, and make the Seventh Part of that a Standart for the Rent *communibus annis*.

7. A Liferenter of Lands who has Right to Stock and Teind, and Farms the Stock, reſerving the drawing of the Teind, having died before *Martinmaſs* after the Teind was drawn; her Executors will have Right to the ſame, as if ſhe had Laboured and Reaped the whole Harveſt. (*a*) When Lands are ſet for Third and Teind, and the Maſter (who is not payed by the Tenent out of the Product of the Corns, but has a like Intereſt in the *ipſa corpora* as the Tenent himſelf,) dies before ſeparation: his Executors have Right to the whole

(a) *Sir Ja: Stuart's Notes upon Dirleton Title Liferenter.*

Third

Third and Teind, as the Tenents Executors would have Right to the two Parts. (*a*) A Titular who is in Poſſeſſion of Teinds, dying before *Michaelmaſs*; they will belong to his Executors *tanquam ſementem fecerit.* (*b*) And Teinds were found to pertain to him who has Right at Reaping time, albeit he die before they are led; (*c*) For Teinds may be diſpoſed of *poſt quam ſeparantur a ſolo.*

(a) *Ibid. Title, Third, and Teind.* (b) *Ibid: Title, Titular.* (c) *Balfour Prat.*

SECT. IV.

Who are lyable to pay Tithes; and who are not?

According to the Canon Law, all Perſons of whatever Condition, Rank or Quality, are Subject to the payment of Tithes. (*a*) Even tho the Product be no more than is neceſſary for maintaining the Heretors own Family. (*b*) 'Tis true among the *Jews*, no man was lyable to pay the Poor man's Tithe to any that was not poorer than

(a) *C. ex tranſmiſſa* 23. *&* *C. ſeq: extr: de decimis.* (b) *Arg. l.* 1. *C. qui bonis cedere poſſint: C: cum homines* 7. *Extr: de decim: Zoeſ: in Decretal: lib:* 3: *tit:* 30. *C:* 2. *n:* 19. *Caniſius de decim: cap:* 5. *n.* 1.

himſelf;

himself; by which means the poorest sort were Excus'd from this Tithe: But none were Exeem'd from the Tithe of Worship. A Dispensation from the Prince doth not Secure against the payment of Tithes. (*a*) For his own Goods are Tithable; (*b*) Altho they be not Subject to Cess or Tribute. (*c*) And this, me thinks, may partly be the reason why my Lord *Stair* (*d*) says the King cannot constitute Feus *de novo cum decimis inclusis*: because that upon the matter were to make Lands Teind-free. But by the Treaty of *Passaw*, (*e*) The Princes of the Empire obtain'd the Power of granting Exemptions from payment of Tithes.

2. Some Canonists teach that all who partake, or are bound to partake of Church-Ordinances, are oblig'd for Tithes; that is, as they Explain it, All such as are Baptiz'd, whether Orthodox or Hereticks in their Opinion: But that Heathens or Infidels are not Subject to a Teind-duty. Others maintain the Contrary, for that these ought not to be better dealt with than Christians. (*f*) *Et nemo de sua improbitate commodum consequi debet.* Yet they are not clear if Whores should pay Tithes; Because it is written, *Thou shalt not bring the hire*

(a) C: *tua* 25. C: *dudum* 31. *Extr: de decim.* (b) *Gloss: in C: omnes Principes* 4. *Extr: de majoritate & obedientia, Rebuff: de decim: q:* 5: *n:* 23. *q:* 8: *n:* 27 *q:* 13. *n:* 101. *Bruneman. de jure Eccles: lib:* 2: *cap:* 6. *n:* 12. (c) *L:* 9. §. 8. ff: *de Publican: & vectigal.* (d) *Instit lib:* 2: *tit:* 8: §: 10. (e) *Which began in the year* 1552. (f) *Arg: L:* 4: ff: *quod vi aut clam: C: eum qui Beneficium* 18: *de prebend in* 6.

of a Harlot into the Houſe of thy GOD for any Vow. (*a*) By the Treaty of *Paſſaw*, it was expreſly provided that *Roman* Catholicks might lawfully claim Tithes belonging to them out of *Proteſtant* Lands, and *Proteſtants* ſuch as are due to them out of *Popiſh* Territories, without any let or interruption. (*b*) Our Law commonly neither allows perſonal Tithes, nor regards the Quality or Character, or Circumſtances of the Perſons by, or to whom Tithes are payable.

3. A Right of Tithes, according to the Canon Law, is effectual againſt all Intromettors. (*c*) If the Lands be ſet in Tack, the Tenent, and not the Maſter, is conveenable. (*d*) And if they be partly Laboured by the Maſter, and partly by the Tenent: Both are to account for the Tithe *pro ratâ*. (*e*) Tithes being *Onus Fructuum, non Prædiorum*; (*f*) And it being unreaſonable, *ut alter alterius odio prægravetur*; (*g*) or that the Deed of the Seller ſhould prejudge the Buyer. (*h*) So, with us Tithes are not *Debita Fundi* affecting ſingular Succeſſors, or affording a Poinding of the Ground for ſuch as were uplifted by their Authors, or others: Even tho the Tithes be valued. (*i*)

(a) *Deuteronom.* 23: 18. (b) *Carpzov: Juriſpr: Conſiſtor: Lib:* 1: *Tit:* 8: *Def:* 137: *N:* 1 & 2. (c) *C: Paſtoralis* 28: *Verſ: fructus autem, C: cum non ſit* 33 *Extr: de Decimis.* (d) *C: Dilecti* 8 *C. a nobis* 24 *eodem: Caniſ: de Decimis, Cap:* 4: *N:* 2: *Zoeſ: in Decretal: Lib:* 3: *Tit:* 30: *N:* 24. (e) *C: tua nobis* 26 *Ext: eod.* (f) *Bruneman de Jure Eccleſiaſtico, Lib:* 2: *Cap:* 6: *N:* 7. (g) *C: non debet* 22 *de Reg: Juris in* 6. (h) *l:* 155: *ff: de. Reg. Juris* (i) *February* 20: 1662: *Earl of Callender againſt Monro, Stair Inſtitut: Lib:* 2: *Tit:* 8; § 32.

Nor

Nor yet is the preſent Heretor liable, while a Liferenter poſſeſſeth. (*a*) But then we allow Tithes to affect all Intrometters, whether with the ſeparate Teind, or with Stock and Teind jointly. (*b*) And a Compriſer of the Heretable Right of Tithes being infeft, was found liable, albeit he was not Intromettor, and renounced his Compriſing. Seing he might have intrometted, and had the legal Remedy of an Action of Spuilzie competent to him againſt any that debarr'd him. (*c*) Tenents who pay a joint Duty to their Maſter for Stock and Tithe, are not liable to any Titular of Tithes, in ſo far as they have paid *bona fide* to their Maſter: But he, in that caſe, muſt anſwer for the Tithes as an Intrometter. (*d*) Nor doth a Citation not preſently inſiſted in put Tenents *in mala fide*: Becauſe of their ſuppoſed Ruſticity and Dependance on their Maſters. (*e*) Upon which account our Law is very indulgent to Tenents in many Analogous Caſes. For payment to their Maſter after Decreet of General Declarator of his Liferent Eſcheat before Citation in the Special Declarator, was ſuſtained to liberate them at the Hands of the Donatar. In regard they might be excus'd, for not knowing of their Maſters Rebellion, till it was particularly intimate to them by Citation. (*f*) It was

(a) *June* 24: 1663: *Menzies contra Lord Glenurchie.* (b) *Stair Inſtit: Lib:* 2: *Tit:* 8: *N:* 1. *Lib:* 4: *Tit:* 24: § 1. (c) *December* 20: 1622: *Preſton contra the Miniſter at*
(d) *Stair Ibid: March* 16: 1627: *Inglis contra Kirkwood.* (e) *Stair Ibid.* (f) *ult: January* 1628: *Donatar of Laird of Cleghorns Eſcheat contra Tenents.*

judg'd ſufficient to aſſoilzie Tenents, that they had paid, though after Citation, a common Duty for Stock and Teind without Diſtinction, as they had formerly done for ſeveral Years. (*a*) Yea, payment of a joint Duty for one Year only, by Tenents to their Maſter, as they had been in uſe to do before to his Author their former Maſter, even after Inhibition execute particularly againſt themſelves; was found to have been made *bona fide*. (*b*) And the Reaſon is obvious, 'cauſe Tenents who are liable to an undiſtinguiſhed Duty for Stock and Teind, cannot know how to divide it proportionally, and what they ſhould reſerve in their own Hands for the Teind. But then, if the Teind were valued apart from the Stock, the Tenents would be liable, and not the Maſter; unleſs he intromet therewith. (*c*) This priviledge of Tenents paying a joint Duty to their Maſter for Stock and Teind, doth only ſecure and defend them againſt Titulars. For they are liable as others to the Miniſter for his Stipend, when payable out of the Teinds. So, one who had taken from an Heretor for a certain Silver Duty, a Tack of the Graſs of ſome Lands, whereof the great and ſmall Tithes, by the Plantation 1618, were made liable to the Miniſter for a proportion of his Stipend, was found oblig'd to pay to him that proportion; the Miniſter

(a) *March* 21: 1628: *Murray contra Intrometters with Teinds.* (b) *December* 13: 1627: *Hepburn contra Tenents of Fairniflat.* (c) *Stair: Inſtit Lib:* 2: *Tit:* 8: § 30: *Lib:* 4: *Tit:* 24: § 1.

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proving, that the Tacksman posseſt the Land the Year contraverted; and that the ſmall Tithes of the Sheep paſtured thereon, and intrometted with by him, did extend to ſo much. And that albeit the Tacksman had paid his Duty to the Heretor, who had Right to theſe Teinds before the Miniſters Charge. But the Tacksman had his Relief againſt the Heretor, (*a*)

4. Merchants purchaſing, before the Tithe is drawn, a whole Crop for a juſt price or Onerous Cauſe, will find themſelves liable for the Teind: (*b*) If the Crop was upon the Ground at the time either Unſhorn, or in Sheaves and Stucks. And that altho they pay the price before any Diligence is us'd againſt them at the Inſtance of the Teind Maſter. (*c*) Becauſe every one is oblig'd to know, that *regulariter* there is a Tithe due out of the Produce of Lands. Mean time I think, that one who buys ſo many Bolls of Victual, eſpecially in publick Mercat, or out of the Barn Yard, tho theſe were the whole Growth of that Year; he would have ſome plauſible pretence to plead an Exemption from payment of a Teind, *viz.* That he was not bound to know, but the Teind was drawn. And this ſeems to be my Lord *Stairs* meaning, when (*d*) he ſays, *that Merchants buying for a price, will not be liable for the Teind.* S. *Simon Degge* (*e*) diſtinguiſh-

(a) *February* 19: 1629: *Kirk contra Gilchriſt.* (b) *Mackenzie Inſtit: Lib:* 2: *Tit:* 10. (c) *June* 24: 1662: *Vernor againſt Allan.* (d) *Ibid.* (e) *Parſons Counſellor, Part* 2: *Chap:* 4.

eth much to this purpose in the case of Tithes of Wood. Where the Owner of a Wood, says he, sells the whole together, or parcels it out, and the Buyers cut it, they must pay the Tithe: But if the Owner of the Wood cut it himself, and then sell it by parcels; it seems reasonable, that he should be liable for the Tithe. As for the payment of Tithe-Fish, the same varies much according to the different Customs of Places. An Alledgeance upon Immemorial Custom of payment by the Buyers and Intrometters with Fishes taken and slain within the Isles of *Scotland*, was indeed sustained relevant to make them them lyable. (*a*) The like Custom of Merchants being in use past Memory of Man to satisfy for the Teind of Fish bought fresh in Boat-fulls, at the first Hand from Fishers in the Isles where they were taken; was found sufficient to make them answer as Intrometters. (*b*) This would insinuate, that these were free who bought not upon the place where the Fishes were taken, or did not buy them fresh, but at the second Hand, after they had been salted by others.

5. The Pope, by the Canon Law, is not bound to pay Tithes, unless of Real Rent belonging to him before his Advancement to the Infallible Chair. (*c*) And he assumes a dis-

(a) *February* 15. 1631. *Bryce, Semple and Schaw, Tacksmen of the Bishop of the Isles, against Brown.* (b) *December* 13. 1664. *Bishop of the Isles contra Hamilton Merchant in Edinburgh.* (c) *A. Monet. Breviar. cum. Auct. de Decimis*, P. 196, 197.

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penſing power as to the payment of Tithes by others. The Canoniſts are ſore put to it, to reconcile this practice with their Opinion of the Divine Right of Tithes: So that ſome of 'em are forc'd to acknowledge, that his Holineſs can only do ſo, when there is a Competency beſide for the Miniſters maintenance. (*a*) This diſpenſing prerogative hath been often exerced in favours of Monks, for procuring and ſecuring their immediate Dependance upon the See of *Rome*. Pope *Paſchal* 2. exempted all Religious Orders from paying Tithes out of Lands Laboured by themſelves, or at their Charges. (*b*) By which it was thought, at that time, the Pariſh Churches would ſuffer no great Loſs, Religious Orders being not very numerous, and unable of themſelves to Cultivate much Ground. But when they afterward increas'd, the priviledge was reſtricted by *Hadrian* 4. to the Ciſtertians, Hoſpitalers, and Templars. And as to the other *Religieux*, he only declared them free from Tithes of their Gardens, or *Animalia quæ nutriuntur*, or *Novalia*, whereof themſelves were at the Pains or Expenſe of Manuring. By *Novalia* we mean Lands recently Ploughed up, and made Arable, which, time out of mind, had lyen Wild and Unlaboured. (*c*) *Adrians* Decree is not extant, but we have it confirmed by *Alexander* 3. in the Year 1170. (*d*) But the

(a) *Barboſ. de Officio & Poteſtate Parochi, Part* 3. *Cap.* 28. § 3. *N.* 13. (b) *Decret. P.* 2. *Cauſ.* 16. *Q.* 1. *C. Decimas* 47. (c) *C. quid per Novale* 21 *Extr. de Verb. Significat.* (d) *C. ex parte tua* 10 *& C. ſeq. Extr. de Decim.*

Im-

Immunity in favours of the Ciſtertians, Hoſpitalers and Templars was thus qualified and explained by *Innocent* 3. in the General Council of *Lateran* 1215, that it ſhould not be extended to *Acquirenda*, but only to ſuch Poſſeſſions as they had before that General Council. (*a*) And they muſt prove that former Right, if they plead upon it: *Nam qui ſe fundat in tempore, hoc probare debet.* (*b*) But yet Probation of Immemorial Poſſeſſion is ſufficient. (*c*) And an Alledgeance that the Abbots of *Cambuskenneth* had receiv'd a certain Duty out of Glebe-Land yearly for thirty Years together, was found relevant *per ſe*, without any other Qualification, to infer that the ſame was Church-Land. (*d*)

6. This Exemption from Tithing in favours of theſe three Orders is perſonal by the Canon Law, and not communicable to Tenents and Feuars. (*e*) Yea it is only competent to the *Religieux* themſelves, when they Labour their own Lands: For they pay'd Tithes like other Men, when, as Tenents, they Occupied the Lands of others. (*f*) This priviledge was once extended here to Lords of Erection, Feuars, and other Singular Succeſſors. And Lands Laboured by an Heretor himſelf were found

(a) *C. pen. Ext. de Decimis.* (b) *Rebuff. Quæſt.* 14. *N.* 42. (c) *Covarruv. Variar. Reſol Lib:* 1: *Cap* 17. *N.* 5. (d) *July* 5:1626. *Laird of Kerſe againſt Mr. Andrew Reid.* (e) *C licet* 11 *Ext. de Decimis Rebuff: de Decim. Quæſt.* 14. *N.* 48. *Caniſ. de Decim. Cap.* 6. *N.* 10 *&* 11. *Barboſ Collect. Doct. in Lib.* 3. *Decretal. Tit.* 30 *C licet* 11. *N* 1. *&* 2. (f) *C. Dilecti* 8 *Ext. de Decim. Caniſ. Ibid, N.* 12, *Barboſ. Ibid. in d. c dilecti N.* 1.

Teind-

Teind-free, in respect they once pertain'd to the Abbacy of *Newbottle*, that was of the *Cistertian* Order. (*a*) But then, Immunity of Singular Successors is again brought under Debate in a Process just now depending before the Session. Sir *George Mackenzie* (*b*) is clear, that not only these are personal priviledges, which should not descend to Lords of Erection; but also insinuates, that the Decision betwixt *Crawford* and *Prestongrange* has not been well digested. And farther tells, that Temple Lands with us enjoyed not the Exemption from Tithing. A *French* Author (*c*) is of Opinion, that this Exemption was never granted, but *Salvo Jure* of any particular Church that might be concern'd. And cites for this the C. *dudum* 31. *Ext. de Decimis*, where the Knights of St. *John* were condemned to pay Tithes to the Church, altho they had a Gift of Immunity from the King and Queen of *Hungary* confirmed by the Pope. Nay farther, he asserts, that such a priviledge to the Monks was to be no longer effectual after they grew Rich, and the Church had need of the Tithes; and that the Title of Poverty, by which only they could claim a Share of these, ceasing, they return to the Church as the true Owner. But our Law never calls in Question the Heretor of Lands once legally exempted: Nor yet such as are infeft *cum Decimis Inclusis*.

(a) *July* 15. 1664. *Crawford* against Laird of *Prestongrange*. (b) *Observ: on the* 29. *Act*, 11 *Parl.* J 6. (c) *Traite touchant l'Origine des Dixmes, et l'Obligation de les Payer.*

7. A priviledge of Exemption from payment of Tithes, is not to be extended according to the Canon Law to *Novalia* afterwards emergent: (*a*) As being a Singularity introduc'd againſt the Canons, odious in it ſelf, and prejudicial to another; and conſequently to be taken in the moſt reſtricted Senſe. (*b*) As for the Canon *ex parte tua* 27. *Extr. de Decimis*, in expiſcating the Senſe whereof, Interpreters are ſo nonpluſt and vex'd; the Argument or Summary would indeed ſeem to inſinuate, that the Conceſſion of a priviledge from paying Tithes, comprehends *Novalia*: But the Text runs quite in other Terms, and can only be underſtood as to the Import of a Parochial Right to Tithes founded in the Diſpoſition of common Law; (*c*) which is properly term'd a Conceſſion. (*d*) For we commonly ſay, *Fruſtra Precibus impetratur, quod Jure communi conceditur.*

8. Miniſters pay no Tithes for their Glebes; (*e*) whether deſign'd by Law, or voluntarily mortified: (*f*) Nor yet Purchaſers of Glebe-Land, unleſs uſe of payment be inſtructed. (*g*)

9. Having ſpoken ſufficiently to the payment of Tithes: We ſhould next conſider what

(a) C. 2. § 1. *de Decimis in 6. Rebuff. de Decim. Quæſt.* 14. *N.* 3. *Covarruv Var. Reſol. Lib.* 1. *Cap.* 17. *N.* 13. (b) *Arg. l.* 2. § 16. *ff. ne quid in loco publico, junct. Reg. Odia* 15 *de Regulis Juris in 6.* (c) *Barboſ. de Officio & Poteſtate Parochi, Cap.* 28. § 3. *N.* 16. *vide Covarruv. Ibid.* (d) *l.* 2. *in pr. ff. ne quid in loco publico.* (e) *Act* 62. *Parl.* 5. *Act.* 10: *Parl:* 23: *J:* 6. (f) *June* 9: 1676: *Burnet contra Gibb.* (g) *Mackenzie. Obſerv: on the* 62: *Act, 5: Parl: J:* 6.

Action

Action and Proceſes of Law is competent about them. And that is either Action extraordinary before the Commiſſion for Plantation of Churches, and Valuation of Teinds: Or ordinary Action before the Lords of Seſſion. We ſhall begin with the former.

CHAP. IX.

Of Actions before the Commiſſion for Plantation of Churches, and Valuation of Teinds.

THE Commiſſion is a Sovereign Court appointed by Act of Parliament, with a Parliamentary Power, to Determine in ſome Extraordinary Matters: Such as the Modifying and Localling Stipends to Miniſters; Valuing and Selling of Tithes; Erecting or Tranſplanting Churches; Uniting, Annexing, Dividing, and Diſmembring Pariſhes. All theſe I deſign to Treat of: But that I may proceed the more diſtinctly, I ſhall previouſly Explain the Nature and Formalities of that Supreme Judicature.

SECTION I.

SECTION I.

The Nature of the Commission; and the Form of Process before that Court.

FOR Determining some necessary Points, that were thought above the Jurisdiction of Ordinary Judges, and yet frequently fell out to be Decided while no Parliament was sitting: Commissioners have been appointed by the Parliament, from time to time, for Judging in such cases, with a Parliamentary Power, and to continue until a new Set were named. Their Decreets cannot be Reduced or Suspended by the Lords of Session; because of the Paramount Authority, they are clothed with. (*a*) But the Commission 1661, was expresly Impowered to alter and Annull all unjust and exorbitant Decreets pronounced by the Commission in the years 1649, and 1650, in Favours of Ministers for their Stipends, or for Dividing, Uniting, Annexing, and building of Churches. (*b*) And they have ever been in use to sustain themselves Judges competent to Reduce all Decreets pronounced by themselves, or by former Commissions.

2. Summonds rais'd before the Commission

(a) *Act* 39. *Parl.* 11. *Ja.* 6. (b) *Act* 61. *Parl.* 1. *Ch.* 2.

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have but one Diet, and may be Executed by any Person, as Sheriff in that part, as well as by a Messenger, and upon such an Execution, the Party if Apprehended personally will be holden as Confest. (*a*) All Diets are with continuation of Days. No Action sleeps here, because of the uncertain sitting of the Judges. Persons called only *pro interesse* dying *pendente processu*; the Action needs not to be transferred against their Heirs. (*b*) It was Ordained by the Commission, 4*th April* 1627, that all Procurators compearing before them should have written Mandats, Registrat in the Commission Books: but this has gone *in desuetude*. Nevertheless Decreet given upon an Advocat's consent, not Subscrib'd by him is null. (*c*)

3. The method of Probation here is something singular, and now much altered from what it was. Formerly, though a conjunct Probation was oftenallowed; (as when the Heretor had Tacks of his own Teinds for payment of a Silver Duty, (*d*) Yet in many cases, one of the Parties was allowed the Prerogative of Probation, that it was preferred to the leading of Probation, which they much contended for. The Titular or Tacksman us'd to get it upon instructing Possession for seven years of fifteen before the year 1628, or Immemorial Possession of drawing the

(a) 10 *July* 1643. (b) 29 *January* 1673. *Cockburn of Ryslaw contra E. of Hume.* (c) *July* 20. 1664. (d) *Mackenzie Instit. lib.* 2. *tit.* 10. *Observ. upon the* 19. *Act,* 1 *Parl. Ch.* 1.

Teind;

Teind; or twenty years Poſſeſſion of uplifting Rental Bolls of a certain Quantity and Quality. (*a*) When the Titular had the ſole Probation, the Heretor could not lead any Probation of the Stock, except for Certification. That is where a Diet was aſſign'd to the Titular having the Prerogative, for proving the drawn Teind, the Heretor was ordinarly allowed to take the ſame day to prove the Stock with Certification, that if the Titular did ſuccumb in his Probation, the Heretors Probation of the Stock ſhould be admitted. Which upon the event of the Titulars failing to prove, was accordinly done; and the 4*th* part Declared to be the Teind whereof he got down a fifth as the Kings Eaſe. And the Titular was ſecluded from all manner of afterprobation. (*b*) So a Titular claiming the Prerogative upon ſeven years Poſſeſſion of fifteen before the 1628. got a day for proving thereof; and the Heretor that ſame day to prove the Value of his Teind, in caſe the Titular did not prove his Alleadgeance of Poſſeſſion; and the Titular having failed to make his point good: The Lords declared conform to the Heretors probation of the Value. (*c*) In ſome caſes the Commiſſioners found themſelves Impowered to moderate the quantity of Teind, proven by the Titular as having the Prerogative. (*d*)

(a) *Ibid.* (b) 24 *February* 1643. (c) 29 *January* 1673. *Cockburn of Ryſlaw againſt the E. of Hume.* (d) 19 *January* 1631.

4. Bu[t]

4. But now in all cases the Heretor has a Joint Probation. (*a*) He may refer the Worth of the Teind to the Titulars Oath before Witnesses be received, but not after: (*b*) And the Titular may prove the Teind Value by his Oath. (*c*) If the Heretor has given his Oath of Verity, the Titular can use no other Probation; only he may get him Re-examined upon new Interrogators. (*d*) But though Stock and Teind, great and small be jointly Valued by the Heretors Oath; yet if the Vicarage pertain to the Minister, he may prove the Value on't otherways if he please. And the Quantity so proven will be deduced off the fifth part contained in the Deponents Oath, (*e*) All conjunct Probation of Stock and Teind not bearing the present, as well as the constant Rent in time coming is null. (*f*) Tho Parties cited before the Commission have but one diet for their Compearance; two diets are allowed for probation. But if the Term be circumduced against a Party for not taking out, and Executing the first Diligence, he will not get a second. (*g*) However Diligence may be Extracted after elapsing of the Diet before the Term be circumduced at the Instance of the other Party. (*h*)

5. The Clerk of Commission in former times

(a) *W. and M. Parl.* 1. *Sess.* 2. *cap.* 30. (b) 24 *February* 1643. (c) 14 *January, and* 29 *April* 1629. (d) 27 *July* 1634. (e) 27 *July* 1634. (f) *January* 19. 1631. (g) *February* 20. 1643 (h) *November* 22. 1634.

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usd to mark the Members of every *Sederunt*, and to insert their Names in Decreets: But this hath gone *in desuetude*. A Decreet of Commission uses not to be Extracted till another Diet of *Sederunt* be elapsed after pronouncing. And if within that time any reclaiming Bill be offer'd, that Bill must also be first read before Decreet is given out.

6. This much I thought fit to premise, concerning the Nature of the Commission Court, and the Form of Process before it in general: the peculiar steps of Formality in particular Actions, shall be Observed in their proper places. Our next Business is to consider the Method observ'd in modelling of Ministers Stipends, before we touch upon Valuation of Teinds: because by the Submissions, Decreets Arbitral and several Acts of Parliament, Ministers are to be provided before the Heretor have Liberty to Value his Teinds.

SECT. II.

Actions for Modifying and Localling Stipends to Ministers.

THE 102. *Act, Parl.* 7. *Ja.* 6. ordained all Benefices of Cure under Prelacies, to be provided in favours of able and qualified Ministers. By vertue whereof they claim'd such Benefices as were not erected into Temporal Lordships and Baronies, or affected

ted and exhausted by Tacks and other Secular Titles. But since few of these could be found, that excellent Statute took little effect, and Maintenance of Ministers turn'd mostly into modified Stipends. Whereof the *Quota* was determin'd by the 3. *Act*, 22. *Par. J.* 6. to be five Chalders of Victual, or Five Hundred Merks. But the Commission of Surrender in the year 1627, appointed Eight Hundred Merks, or Eight Chalders of Victual, as the lowest Stipend for a Minister; Except particular Reasons occur for going beneath that proportion. Which was ratified by the 8*th*. and 19*th*. Acts of the Parliament 1633. And the consideration of these Reasons referr'd to the Commissioners for Plantation. *&c.* By the Strain of that 8*th*. Act, it would seem they could only modifie a lesser Quantity for the Minister's maintenance, where Valuations of the Teinds were already led: Because before a Valuation, it cannot be known if there be more free Teind in the Parish as will amount to eight Chalders of Victual. But yet where it is notour that the meanness of the Parish, and penury of the Teind cannot bear so much, the Commission is in use to modifie less Stipends. (*a*) Which they likeways do, even where there is plenty of Teind, if the Lands be Feued, *cum decimis inclusis.*

2. Ministers in Mensal Churches under Episcopacy had no Decreets of Locality, nor the benefit of the high Stipend provided by the

(a) *Mackenzie Observ: on the* 8. *Act, Parl:* 1633.

Parliament 1633. They behov'd to hold themſelves content with what the Biſhop pleaſed to ſettle upon them for a mean of Subſiſtance. But theſe by the 30. *Act, Parl.* 1641, were ordain'd to have the full Quantity of eight Chalders of Victual, or Eight Hundred Merks out of the Tithes of their own Pariſhes; failing whereof, out of the Teinds of other Churches of the Biſhoprick: And were provided accordingly. The Miniſters in menſal Churches were depriv'd of theſe Stipends at the returning of Biſhops, and reduc'd to their wonted State of Dependance upon the Liberality of the Ordinary. But now when Prelates are again turn'd out, all Miniſters are upon the ſame foot of Proviſion, and have the like claim to the legal *Quota* of eight Chalders of Victual or Eight Hundred Merks; where it can be had out of the free Teind of the Pariſh. Yet, when Miniſters in menſal Churches purſue for a modification of Stipend, they muſt call the Officers of State, becauſe the Biſhops Teinds are in the Queens hand. And in ſuch Caſes the Commiſſion uſed not to take upon them to modifie any Stipend out of theſe Teinds: But only to recommend to the Lords of Theſaury, to procure a Gift from Her Majeſty in favours of the Miniſter. As was done to the Miniſter of *Forgondennie*, and to the Miniſter of the Weſt Church of *Edinburgh*, &c.

3. This determin'd proportion of eight Chalders of Victual of Stipend is *regulariter*, the *minimum quod ſic*; But the Commiſſion is not reſtrain'd from exceeding the ſame, where there

there is a great Charge and much Teind. (*a*) The eight Chalders were to be reckoned by the number of Bolls, and not by the Value. (*b*)

4. Sometimes the Commission only modifies a Ministers Stipend, which is called a Decreet of Modification: Sometimes again they not only modifie, but also divide and proportion the Stipend among the Heretors, and that we term a Decreet of Locality. After a new Church is appointed in a Parish, there can be no Stipend modified till the Church is built, and an actual Minister presented to it. (*c*) The Minister's Stipend should be modified out of the Teinds of the Parish where he serves the Cure. (*d*) But yet where a Minister is sufficiently provided, the Commission uses sometimes to appropriate the Free-teind of his Parish for making up a competency to the Minister of the adjacent Parish: (*e*) If the Teinds thereof be exhausted. (*f*) Or otherways no Augmentation should be granted out of other Parishes. (*g*) The Commission being impower'd to take off from larger and add to lesser Parishes; They found that where Lands are disjoin'd from one and annex'd to

(a) 27. *February* 1666. *Mr. Thomas Thores Minister at against his Parishioners.* (b) 20. *February* 1643. (c) 17. *July* 1643. (d) *Act* 17. *Parl:* 1633. *Act* 28. *Parl:* 1. *Ja:* 7. *Act* 22. *Sess:* 2. *Ibid: Act* 30. *Parl:* 1. *Sess:* 2. *W. and M.* (e) *Mackenzie Observ: on the* 17. *Act, Parl:* 1633. (f) 10 *February* 1669. *Reid Minister of North-Leith against the Minister and Heretors of St. Cuthberts.* (g) 19. *February* 1662. *Lord Cochran against Greenock and Taylor his Minister.*

another Parish, whereof the Teinds were a part of the Stipend of the Minister of the former Parish; These Teinds shall accresce to the Incumbent of that Parish to which the Annexation is made, and the other's Loss be supply'd out of the Free-teind of his own Parish. (a) But if that be exhausted, the Lands dissolv'd must pay to the former Minister as before: (b) Though *quoad curam animarum*, they be within anothers Parish. And in this Sense we are to understand the Act of Commission the 23*d.* of *March* 1631, whereby the dismembring of any part of a Parish, is not to prejudge the Church from which it is dismembred; but the Teind to be lyable to the Stipend of the Minister thereof as formerly. Teinds are so far affectable for Ministers Stipends, that fourteen Bolls of Victual being payable to a Minister out of some valued Aikers by Feuars, the Teind-master was found oblig'd to allow yearly to them their respective proportions of the price of the said fourteen Bolls, liquidate by the Fiars. Who, in case that exceeded the valued Duty of the Aikers, were allowed Retention of the *Superplus*, in subsequent years, when it should happen to fall short, and be within the valued Duty. (c)

5. Voluntary Contracts for a certain modi-

(a) 20. *February* 1643. 7. *February* 1666. *Fogo Minister at Grifan against his Parishioners.* 28. *July* 1669. *Pringle Minister at Fogo against* (b) 19. *February* 1662. *Earl of Kinghorn against Walker Minister at Auchtertoul.* (c) 26. *February* 1668. *Mackubine and others against the Minister of Jedburgh.*

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fied Stipend, are ſometimes entered into by the Miniſter and thoſe having Right to the Teinds of the Pariſh: Which they offer to the Commiſſion in order to be ratified. As was done (*a*) by the Earl of *Glencairn* Patron of the Church of *Kilmaures*, who upon a Supplication got the Commiſſions Approbation of a Contract paſt betwixt him and Mr. *Robert Lawrie* Dean of *Edinburgh*, Titular of the Teinds of that Pariſh, whereby ſeven Chalders of Victual and 100 Merks of Money was ſettled for the Stipend. Mr. *Lawrence Skinner* Miniſter of *Brichen* obtain'd alſo an Approbation of an Agreement betwixt the Heretors and him, concerning an Augmentation. (*b*) And many other Tranſactions of that nature have been ratified by the Commiſſion. But then an Agreement made with a Miniſter, whereby he accepted a certain Quantity of Stipend in ſatisfaction of all that he could claim either for Parſonage or Vicarage-teind, was found not to debar him from ſeeking an Augmentation: For that he could not prejudge his Succeſſors. (*c*)

6. Beſides the Miniſters Stipend, there is ordinarly a certain Sum modified for Communion Elements, which is made more or leſs according to the Extent of the Pariſh and Number of Communicants therein, but ſeldom exceeds Fifty Merks. So much for Modifications, we proceed to Localities.

(a) *February* 25: 1663. (b) *July* 3: 1667. (c) *February* 21: 1666: *Mr: Thomas Thores Miniſter at againſt his Pariſhioners.*

7. The time was, when the Titular might Allocat any perſons Teinds he pleas'd, towards the maintenance of a Miniſter that had no ſettl'd Proviſion, and ſo elude the Priviledge of Buying: (*a*) Albeit, where the Miniſter had ſome Proviſion, though ſmall, the Titular behov'd to caſt the Augmentation proportionally on the whole Teinds of the Pariſh. (*b*) And he could not aſſign the Teinds of one Pariſh to the Miniſter of another. (*c*) But now Patrons, Titulars, or Tackſmen, after Citation at the Inſtance of an Heretor purſuing a Sale of his Teinds, cannot Allocat the Purſuers Teinds ſolely, but only proportionally with the reſt of the Teinds of the Pariſh: Only they may except the Teinds of their own Lands, where there is Sufficiency of Teind beſide. (*d*) Yet a Patron having conveyed to an Heretor all Right which he had, or ſhould thereafter acquire to the Tithes of that Heretors Land: It was found, that the Patron, notwithſtanding the Supervenient Act of Parliament 1693, (*e*) could no otherways burden theſe Tithes with an Allocation, than *pro rata*, with the reſt of the Pariſh: Without Exception of the Teinds of his own Property. (*f*) Becauſe the Right acquired to the Patron, by the Act 1690, was found (*g*) to accreſce to the Heretor: It were abſurd to

(a) *February* 9: 1631: *February* 17: 1645: *Act* 61: *Parl*: 1: *Ch*: 2*d*. (b) *Mackenzie Obſerv*: *on the* 17: *Act*, *Parl*: 1633. (c) *July* 14: 1634. (d) *W*: *and M*: *Parl*: 1: *Seſſ*: 4: *Cap*: 24. (e) *d*: *Act* 24. (f) *December* 3: 1698: *Allardice of that Ilk againſt the Viſcount of Arbuthnet*. (g) *Inter eoſdem*.

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allow him, who cannot take the Superplus Teinds to himself, to assign them to the Minister. Seing that would be indirectly *Fraudem facere Contractui*: For *qui facit per alium, facit per se*; and the Allocation to the Minister, for saving his own Tithes *pro tanto*, is the same thing upon the matter, as if the Patron himself should uplift.

8. The Order observ'd in imposing of a Ministers Stipend, or Augmentation on the Parish, is this; While there is any free Teind in the Titulars Hand, he is oblig'd to relieve the Heretors, who have bought their own Teinds from him, of their proportion of the Ministers provision: Though a Tacksman having Right to other Mens Teinds would not find himself oblig'd to any such Relief. (*a*) An Heretor having alledg'd, that there was free Teind in the Titulars Hand, and the Titular denied that he had any; the Lords reserved to the Heretor Action of Relief against the Titular as accords. (*b*) Teinds, even after the Heretor has bought them, are liable to be evicted by the Minister, if there be no free Teind in the Titulars Hand. (*c*) Tacksmen of their own Teinds are not liable, so long as the Titular has free Teind of other Mens Land undispon'd. (*d*) And the Tack Duty payed to the Titular must go to

(a) *January* 27: 1635: *Earl of Marr contra Laird of Glenkindie.* (b) *July* 29: 1668: *William Duncan Minister at Easter Kilpatrick against Laird of Cloberhill and other Parishioners.* (c) *July* 28: 1634: *Parish of Selkirk and the Earl of Linlithgow.* (d) *February* 8: 1643.

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the Miniſters proviſion, before the Heretor as Tackſman be burden'd. (*a*) Though it would ſeem reaſonable, that where a Miniſters Stipend is caſt by a Locality upon the Teind of any Pariſh, it ſhould be payed in the ſame *Species* of Victual or Money to the Miniſter, as it is payed to the Titular or Heretor; yet, by the conſtant Practick of the Commiſſion, the Chalder or *Boll* of Teind is ordinarly burden'd with ſo much Money to make up the proportion of almoſt every Stipend: There being few which doth not conſiſt of both Money and Victual.

9. A Miniſters Decreet of Proviſion and Locality where there was plenty of free Teind us'd to be drawn back by the Commiſſion to the Date of Summons. (*b*) Heretors were decern'd for an Augmentation to a Miniſter who preach'd in a Language they underſtood not. (*c*) Where, by a miſtaken or wrong Calcul, there was more than the due Quantity aſſign'd to the Miniſter out of any Mans Teinds according to the proportion of his Valuation; the Commiſſion was impower'd, by the 30 Act 1641, to rectify the ſame, without prejudice to the Miniſters poſſeſſion, till his Stipend was made up out of other Teinds of the Pariſh. A Decreet of Locality was reduc'd upon theſe Reaſons, That, before the Augmentation, the Miniſter had Nine Chalders of

(a) 18 *July* 1636: *February* 15: 1643. (b) *January* 25: 1665: *Row Miniſter at the United Kirks Monivaird and Strowan.* (c) *January* 25: 1671: *Strachan Miniſter of Weem againſt Laird of Menzies and others.*

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Victual, and the Heretors and Tacksmen of the Teinds were not called thereto. 2. Those called as Heretors were never infeft, and so could not be decern'd personally in any part of the Stipend. 3. Where Heretors have free Teind in the Parish, no Tacksman's Teinds should be allocat to the Minister for the Years of his Tack, or for the time he possesses after it is out *per Tacitam Relocationem*, without a Legal Interruption. (*a*) A Decreet was reduc'd *pro futuro* upon this Ground, that the proportion decern'd against an Heretor for the Ministers Stipend not only exceeded the Valuation of his Teind, but also was converted from Money to Victual. But the Decreet was allowed to stand as to bygones. (*b*)

10. When Ministers pursue Localities or Augmentations of their Stipends against the Heretors, the Titular of the Tithes must be call'd. Therefore no Process was sustain'd at the Instance of Mr. *Francis Pearson* Minister at *Kirkmichael* for an Augmentation; because the Earl of *Tweddale* Titular of the Teinds of the Parish was not cited; (*c*) A Bishops Declaration bearing, that a certain person was Minister at such a Kirk, and his Service there *notorium*, was sustained to afford Action to the Minister for an Augmentation, without production of his presentation, or any other Title. (*d*) Mr. *Patrick Simson* Minister at *Logie* hav-

(a) *January* 25: 1665: *Moncrief of Tippermalloch contra Minister of Methvin.* (b) *December* 4: 1661: *Brown of Thornidikes contra Vetch Minister at Westruther.* (c) *June* 30: 1669. (d) *Febr:* 19: 1673: *Mr: Francis Masson Minister at Kirkmichael.*

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ing obtained an Augmentation, which was laid upon the Earl of *Ethies* Tack Duty payable to the Maſters of the Colledge of St. *Andrews*, who are Titulars of the Tithes of the Pariſh: It was declared in the Decreet, that the Colledge ſhould pay the Augmentation when the Tack expired, if not renewed. (*a*) Miniſters uſe ſometimes, for the more Expedition and Diſpatch, to give in Rentals of the Stock and Teind of the Pariſh, offering to prove the ſame to be true and genuine by the Defenders Oaths. Conform to which, the Stipend is modified and localled upon them, if they be holden as confeſt. A Miniſter purſuing a Locality upon the Teinds of his Pariſh, and having given in a Rental of the whole, which he referr'd to the Oaths of the Titulars and Heretors, and craving they might be holden as confeſt, and the Term circumduc'd againſt them for not compearing to depone: It was alledged for one of the Titulars, that the Heretors did, by Colluſion with the Purſuer, induſtriouſly abſent to conceal their Rents; and therefore crav'd a Diligence for citing them. Which being granted, they yet not compearing, the Miniſter inſiſted, that he might ſuffer no farther Delay in the ſettling of his Stipend. Upon which it was crav'd for the foreſaid Titular, and granted, that the Decreet to be pronounced in favours of the Miniſter ſhould be extracted with this Clauſe inſert; *Without prejudice to him to purſue the He-*

(a) *February* 25: 1663.

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retors for the Superplus Worth of their Teinds more than is contained and allocat in the Decreet. (a) Mr. *William Skinner* Minister at the United Kirks of *Logieleaf* and *Innergellie* having obtained a Decreet of Augmentation and Locality: Sir *Alexander Wedderburn* of *Blackness* protested for Relief off the persons from whom he bought the Lands affected with the Ministers Stipend. (b)

11. 'Tis the Business of the Commission, to provide Ministers out of the Tithes of their own Parishes. But Ministers within Burgh, who have no Landwart Parish, or second Ministers, where the Tithes are exhausted by Stipends to the first; are either provided by Mortifications and Gifts, or a Voluntar Contribution of the Inhabitants, or by an Annuity imposed on the House Rents by Act of Parliament. The Town of *Edinburgh* have Warrand by Authority of Parliament for imposing, towards the payment of their Ministers Stipends, an Annuity upon the Inhabitants, except the Colledge of Justice, proportion'd to the Rents they pay for their Houses. Which Annuity is Six *per Cent.* of the valued Rent of each House that is inhabited and possess'd. And the Valuation is yearly taken up by Stent-Masters chosen by the Council of the Burgh.

12. I advance from discoursing of Ministers Stipends, to treat, as was propounded, the Valuation of Tithes. And because some Tithes can on-

(a) *July* 16: 1673: *Douglas Minister at Longformacus against his Parishioners.* (b) *February* 7: 1666.

ly

ly be valued, others may be valued and bought; ſimple Valuations ſhall be firſt handled, and then Valuations and Sale.

SECT. III.

Concerning Actions of Valuation of Tithes.

IT having been always grievous and uneaſie to Heretors and others to wait till their Tithes were draw'n, the Parliament thought fit, for preventing Abuſes committed in the Leading of Tithes, to introduce the Benefit of a Valuation. That Heretors and others might freely intromet with their Tithes as well as the Stock; and the Tithe Maſters Intereſt be compens'd by an equivalent valued Duty.

2. Tithes are valued at the fifth part of the conſtant Rent, when ſet with the Stock for a joynt Duty. And a Valuation of ſuch Tithes was reduc'd for being above the fifth part of the Rent. (*a*) When diſtinct Duties are pay'd for Stock and Tithe, they are valued a fifth part down of the True Worth and Avail, according to the King's eaſe. (*b*) The fifth part of Rent pay'd for Stock and Tithes, is the ſame with the fourth part of the Rent of the Stock: But a probation of the Rent of the Stock being led, and a diſtinct probation of the yearly

(a) 29. *July* 1664. *E. of Ethie againſt the E. of Panmure and others.* (b) *Act* 17. *Parl.* 1. *Ch.* 1.

value

value of the Vicarage-Tithes, the Parſonage-Tithes were not found to be the fourth part of the intire Rent of the Stock, but only the fourth of what remain'd after deduction of a Stock correſponding to the Vicarage-Tithes. But then the Vicarage was valued according to the full Rent, tho ſeparately proven, without any allowance for the King's eaſe, in regard of the foreſaid Deduction. (*a*) The Earl of *Kinghorn* obtained a Decreet valuing the Stock and Parſonage-Tithes of the Barony of *Balhelvie* and *Balmedie*, againſt Mr. *David Lindſay* Parſon of *Balhelvie* in abſence, bearing a Reſervation in favours of the Purſuer, to claim Deduction out of the ſaid Valuation, of a Stock correſponding to the value of the Vicarage drawn by the Miniſter. (*b*)

3. There muſt be ſeparate Valuations of Parſonage and Vicarage belonging to diſtinct Titulars; That the Vicar be not fruſtrat of the true Worth of his Tithes. (*c*) The Vicarage-Tithes which are Local and Variable, muſt be rated according to uſe of payment, and the Parſonage ſhould be valued to a fifth part of the Corn-rent. That this fifth may be the more juſtly and equally ſtated, a Calcule uſeth to be made of ſeven preceeding years Rent, and the ſeventh part of the Total is reckoned the true Rent *communibus annis*. Of Which

(a) *March* 4. 1702. *Brodie of Miltoun againſt the Officers of State, Miniſters of Elgine and others.* (b) 23. *January* 1663. (c) *Acts* 17, *and* 19. *Parl.* 1. *Ch:* 1. *Act* 28. *Parl:* 1. *Ja:* 7. *Act* 22. *Seſſ:* 2. *Ibid*, *Act* 30. *Seſſ:* 2. *Parl: W. &* M.

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the fifth is the Legal Value put upon the Parſonage Tithes. But then ſome Deduction uſeth to be given to the Heretor upon the account of induſtrial and coſtly Improvements of the Ground, by Liming, Dunging, or otherways, *&c.* In a Proceſs of Valuation at the Inſtance of ſome Heretors within the Pariſh of *Dumbar*, againſt the Earl of *Roxburgh*, they got an Eaſe of ſo much of the proven Rent, as the Tenents deponed they would have pay'd leſs, had it not been for the benefit of Seaware, which their Maſters procur'd from the Town of *Dumbar*. And the conſtant yearly worth of each Acre of the Barony of *Broughtoun* in Stock and Tithe, was found to be only ſix Firlots of Bear; Albeit it was proven that theſe Acres pay'd eleven Firlots, with the benefit of the Town of *Edinburghs* Muck: In regard the Witneſſes gave Evidence, that without the ſaid Dung, the value of the Acre would not have exceeded ſix. (*a*) Albeit it was alledged that the Soiling and Dunging of Ground, being the ordinary Expence of Labouring, could not be deduc'd off the proven Rent: Seing the Lands of *Broughtoun* always had, and will have the advantage of *Edinburgh-muck*, by reaſon they ly ſo near to the Town. And if any Deduction were allowed, it ſhould at moſt be only the charges of carrying three or four Score of Loads of Muck once in three years: The Dunging of Land being far from

(a) *December* 28. 1698. *The Adminiſtrators and Theſaurer of Heriots Hoſpital againſt the Officers of State.*

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the caſe of Liming, which is an extraordinary Expence to the Heretor or Tenent, in buying and bringing home the Lime. For to this it was Anſwered, that the Dunging of Lands about *Edinburgh*, is no leſs chargeable than Liming in other parts. Since the Town of *Edinburghs* Muck is bought at ſo much for the Cartful, and conſiderable gain might be made by the Servants and Horſes who carry the ſame, if they were imployed in tranſporting of Goods betwixt *Leith* and *Edinburgh*.

4. *February* 28. 1628. The Commiſſion ratified a Letter from the King declaring old Rentals to ſtand for a Valuation where the Parties conſent, or do not oppoſe it. And it was found relevant againſt a Valuation of Rental-bolls, that the Quantity of them was within the worth of the Teind, if *ipſa corpora* were drawn. (*a*)

5. Valuations are ſuſtain'd not only at the inſtance of Heretors, but alſo of Miniſters, or Titulars, or Tackſ-men. And all theſe muſt be cited when the Heretor purſues. (*b*) There was found neceſſity of calling the Miniſter, even when he was *aliunde* provided. (*c*) Parſonage Tithes were valued againſt a Miniſter who was Titular, with this Proviſion, That the Miniſter ſhould not be prejudged of his modified Stipend and the Vicarage Tithes; Nor the other Heretors burdened above their

(a) *January* 27. 1669. *Stuart of Gairntully againſt Nairn of Strathurd.* (b) *Mackenzie Inſtit: lib:* 2. *tit:* 10. (c) *February* 1. 1671. *Lady Purveſhaugh.*

Locality

Locality at that time. (*a*) When the Pariſh Church is Vacant, the Moderator of the Presbytry, and the Agent of the Church, muſt be cited. An Heretor was found to have Intereſt to ſeek his Tithes valued, even againſt a Tackſman in poſſeſſion of the Lands, by vertue of a Proper Wadſet: But the benefit of the Valuation accreſc'd to the Wadſetter, during the not Redemption. (*b*) For when a Valuation is led againſt a Tackſman, he gets the valued Duty during the Tack, and the Titular thereafter. A Valuation, tho rais'd by an Apparent Heir before he was infeft, was ſuſtain'd upon production of his Infeftment. (*c*)

6. Tacks of other Mens Tithes may certainly be valued. But if it be asked, Whether an Heretor having a Tack of his own Tithes, can get them to be valued while the Tack is ſtanding? One would think, if the Tack was made ſince the allowing of Judicial Valuations by Law, he can only purſue a Valuation to take effect at the Iſh of the Tack. Becauſe the ingaging for a certain Tack-duty, is a tacit paſſing from the preſent Benefit of a Valuation. But if the Tack was entered into before Actions for Valuation were competent; Nothing ſeems to hinder the Heretor from obtaining his Tithes effectually valued, ſo as to be lyable only for the valued Duty during

(a) 4. *February* 1663. *Hamilton of Aldſtoun againſt Lockart Miniſter at Dunſyre.* (b) 22. *June* 1636. (c) 29 *January* 1673. *Sir James Cockburn of Ryſlaw againſt the Earl of Hume.*

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the Tack: Seing he can never be understood to renounce, by taking a Tack of his Tithes, the benefit of a Supervenient Law.

7. As in a Process of Valuation at the Instance of the Heretor; the Titular Tacksmen & Minister should be called: So must he, when any of these Pursue; that he may Object against the Witnesses upon the common Grounds of Law, such as partial Counsel, Deeds of Corruption, Blood-relation, Dependence on the Pursuers, and the like. A Decreet of Valuation was Reduced for not citing the Heretor, albeit it mention'd him to have consented; and his Tenents had payed the valued Duty conform, for the space of 40 years: since no Writ under the Heretors hand was produc'd to instruct the Consent, and bind it upon him. And tho in improbation of Decreets, Certification against Minuts of Process, or Executions, will not be granted after many years; in respect such small Papers are easily lost: Yet Writs subscriv'd by Parties must always be made furthcoming. (*a*) Not only must the Heretor be called in a Valuation at anothers instance; but also Compryfers, if they be in Possession, otherways not. (*b*) But such as are only called *pro interesse*, dying *pendente processu*; the Action needs not be transferred against their Heirs. (*c*)

(a) 19 *February* 1673 *Lord Craigie against the Lords Cathcart and Bargany.* (b) 29 *January* 1673: *Cockburn of Ryslaw against the Earl of Hume.* (c) *Inter eosdem.*

8. An Heretor or Liferenter by Infeftment, during the Dependence of a Proceſs for Valuation of their Teinds, may get the Leading of them (if they apply for it by a Bill to the Commiſſion) upon finding Caution to pay at theevent conform to the Valuation to be led. (*a*) Albeit by the *Act* 17, *Par.* 1633, *Theſe are to have the Leading and Drawing of their own Teinds, the ſame being firſt Valued*: Which Clauſe would ſeem to Suſpend the leading till the cloſe of the Valuation. This Priviledge of Leading during the Dependence, was allowed to one who payed formerly Rental Bolls, and whoſe Tithes had never been drawn. (*b*) but not to Rentalers or Tenents: (*c*) theſe not being Infeft. Yet an Heretor not Infeft may claim the Benefit to lead his own Tithes, if he inſtruct a ſufficient Title for Infeftment; and ſhew that he is not *in mora* to compleat his Right. (*d*) Now a Warrand for Leading Tithes obtain'd upon pretence of a depending Action for Valuation, falls by the Defenders taking out a Proteſtation for not inſiſting. (*e*)

9. It is an ordinary thing for obviating ground of Debate, that all Parties concern'd do agreee to a Valuation of Conſent; and then offer the ſame to be Ratified by the Commiſſion. So two Contracts of Valuation, one betwixt the Earl of *Glencairn*, and Mr.

(a) *July* 14. 1630. *Junct. November* 30. 1631. (b) 3 *July* 1643. (c) *March* 8. 1630. (d) *July* 6. 1642. (e) *Act* 24. *Seſſ.* 4. *Par. W. and M.*

Robert Laurie Dean of *Edinburgh*, Titular of the Tithes of the Pariſh of *Kilmares*; and another betwixt the ſaid Titular and the Earl of *Eglingtoun*, was approven by the Commiſſion. (a) And ſeveral Contracts of Valuation betwixt the Duke and Dutches of *Buccleugh* and other Perſons, were Ratified 20 *December* 1665.

10. Formerly there could be no Valuation of Tithes whereof the Clergy were in Poſſeſſion by drawing *ipſa corpora*, or uplifting of Rental Bolls the time of their Submiſſion. (b) And therefore Valuations of ſuch were null. (c) But this Priviledge King *Charles* the firſt by his Miſſive Letter, (d) Declared to be meerly perſonal in Favours of Churchmen, and not competent to their Laick Tackſmen: during whoſe Tack the Heretor might have had his Tithes Valued, without prejudice to the Eccleſiaſtick Setter to injoy the ſame after expiring of the Tacks as formerly. Accordingly (e) a Valuation was ſuſtain'd to *James Hamilton* of the Tithes of the Lands of *Hetherwick* againſt the Earl of *Roxburgh* the Biſhops Tackſman. Tho upon this account probably Churchmen got leſs Tack-duties and Graſſums from Laicks. But now all Tithes are allowed to be valued: (f) Except *decimæ incluſæ* Feued with the Stock, and Confirmed before the year 1587. (g) Such

(a) 25 *February* 1663. (b) *Act* 17. *and* 19. *Par.* 1633. (c) *Act* 9. *Par.* 1. *Seſſ.* 2. *Ch.* 2. (d) *May* 9. 1634. (e) *February* 1679. (f) *Act* 30. *Seſſ.* 2. *Par. W. and M.* (g) *January* 23. 1631.

being look'd upon in our Law as no Tithes, and not affectable by Miniſters. Nothing can be valued but the Free Tithe, over and above what is allocat for maintenance of Miniſters, and other Pious uſes. And the Heretor is only lyable to the Titular or Tackſman for the valued Duty of that Superplus. (*a*)

11. The Teind-maſter after Valuation is not bound to paſs from his former Right or Poſſeſſion in Favours of the Heretor, or other Obtainer of the Valuation, till he get real Security by Infeftment for the valued Bolls, or Silver-duty. (*b*) But this I never knew required. And the Reaſon poſſibly is, for fear of Provoking the Heretor not to reſt in the Valuation, but to purſue a Sale; which certainly he would chuſe to do, rather than give Infeftment in his Lands for the Titulars valued Duty. The Term of payment of this valued Duty is betwixt *Yule* and *Candlemaſs*: (*c*) and valued Bolls are to be delivered according to *Linlithgow* Meaſure. (*d*)

12. The Commiſſion is impowered to Rectify former unequal Vaulations: But ſuch as were lawfully led againſt all Parties having Intereſt, and allowed, could not be draw'n in queſtion upon pretence of enorm leſion at the Inſtance of the Miniſter not being Titular, or at the Inſtance of the Kings

(a) *Act* 17. *and* 19. *Parl.* 1633. (b) *Auguſt* 6, 1630. *Act of Commiſſion Junct. Act* 17. *Par.* 1633. *Mackenzie Inſtit. lib.* 2. *tit.* 10. (c) 23 *March* 1631. (d) 29. *May* 1627.

Advocat

Advocat for his Annuity; unleſs Colluſion betwixt the Titular and Heretor, or the Procurator-fiſcal and them, be inſtructed; which is preſumed *præſumptione juris & de jure*, when the Valuation is led with a diminution of the third of the current Rent, to be proven by the Parties Oaths. (*a*) Albeit ordinary Venditions with us are not reduceable upon the Head of Leſion *ultra dimidium*. But the Clauſe in the Acts of Parliament, making this Colluſion probable by Oath of Parties, was not found Excluſive of other probation. (*b*) A Valuation of the Tithes of the Landwart Pariſh of *Perth* was reduc'd at the Inſtance of the Magiſtrats as Patrons of the Church, and Titulars of the Tithes, againſt the Heretors, upon this Reaſon, that it was a Third within the real worth of the Tithes, the time of deducing thereof. (*c*) A Reduction of a Valuation of Tithes is ſuſtain'd at the Inſtance of the Heretor as well as Titulars, or Miniſters; if the Valuation craved to be reduc'd was not carried on at the Heretors own Inſtance. (*d*) Witneſſes adduced in a Proceſs of Valuation were Ordained to be Re-examined, becauſe they had not diſtinguiſhed betwixt Infield and Outfield Acres. (*e*).

(a) *Act* 19. *Par.* 1. *Ch.* 1. *Act* 61. *Par.* 1. *Act* 15. *Par.* 2. *Seſſ.* 3. *Ch.* 2. *Act* 28. *Par.* 1. *Ja.* 7. *Act* 22. *Seſſ.* 2. *Ibid.* *Act* 30. *Seſſ.* 2. *Par. W and M.* (b) *January* 1672. *Meldrum againſt Tolquhon.* (c) *February* 5. 1662. (d) 19 *February* 1673. (e) 24 *July* 1667. *William Chirnlaw againſt E. of Hume.*

SECT. IV.

Concerning Actions of Valuation and Sale of Tithes.

BY King *Charles* the first's Decreet Arbitral, and the 17 *Act, Par.* 1633. Tithes being Valued, may be bought at Nine years purchase: And if they consist in Victual, or other Goods, the same is to be reduc'd into Money, according to the Rates of that part of the Country where they are payable; and temporary or inferior Rights should be proportionably cheaper according to the continuance and quality of 'em. A Tack of Tithes was once Ordained to be Sold to the Heretor at Eight years purchase: and in case the Tacksman acquired the Heretable Right of 'em before expiring of the Tack, the Heretor was Ordained to give him another years Purchase for the same. (*a*) But now the method taken with Tacksmen in a Sale of Tithes, is to value the Tithes, and Stock the valued Duty in a principal Sum, answering to Nine years purchase. The Heretor is obliged to give Security to the Tacksman for the Annualrent thereof during the course of his Tack; and to the Titular for the Principal

(a) 13 *July* 1664. *Cockburn of that Ilk against Hume of Blaccadder.*

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after expiring of the temporary Right. Tho Nine years purchaſe be the fix'd Heretable price of ordinary Tithes: Yet thoſe that were given to Patrons, as not having been Heretably Diſponed, in lieu of the Right of preſenting Miniſters taken from them, are redeemable by the Heretors at ſix years puchaſe after a Valuation. (*a*) The reaſon of the Diſparity is obvious; Patrons came eaſily by theſe Tithes, and therefore ſhould the more eaſily part with 'em.

2. Thoſe who buy their own Tithes are only obliged to pay for ſo much as is free Tithe, over and above what is appropriat to Miniſters and pious Uſes: But muſt relieve the Titulars of the Kings Annuity and Miniſters Stipends *pro rata*. (*b*) Deduction of the ordinary Price ſhould be given to Heretors having already ſtanding Tacks, or other Rights of their Tithes, according to the Nature and duration thereof. (*c*) But yet one who had Tacks of his own Tithes purſuing a Sale, was Decern'd to pay the whole Price to the Titular at the Iſh of the Tack. (*d*) The Price of Tithes ſhould be payed at *Whitſunday* preceeding the Cropt, with Annualrent from that Term. (*e*)

3. By an Old Practique of the Commiſſion, (*f*) It was found that the Titular might put the Heretor after Valuation to condeſcend

(a) *Act* 23. *Seſſ.* 2. *Par. W. and M.* (b) *Decreet Arbitral.* (c) *Ibid.* (d) 27 *February* 1637. (e) 30 *November* 1631. (f) 23 *March* 1631.

whether

whether or not he would buy; and if he refus'd, he and his Succeſſors were to be cut off from the Benefit of Purchaſing theſe Tithes thereafter. But this I never found Obſerved.

4. Heretors formerly us'd alſo to be Excluded from acquiring their Tithes, if they imbrac'd not the Benefit within two or three years. Heretors tho under Minority by the Act 17, *Par.* 1633, had only Liberty to buy their Tithes within two years of Expeding the Valuation; unleſs the Titular was Minor, or otherways impeded to ſell: In which caſe the Heretor offering to buy within that ſpace, was allowed to buy at any time immediately after Removal of the Impediment. By the *Act* 61, *Par.* 1. *Char.* 2. and the 28 *Act. Seſſ.* 3. *Ibid.* It was competent to Heretors to buy within three years after Valuation: And Minors whoſe Tutors neglected the Buying of their Tithes in due time, were allowed an Action of Sale for two years after their Majority. By the *Act* 15. *Seſſ.* 3. *Par.* 2. *Char.* 2. and the *Act* 28. *Par.* 1. *Ja.* 7. Heretors had acceſs to buy their Tithes within three years after the reſpective Dates of theſe *Acts*. But yet a Titular of Tithes having promis'd to ſell them to the Heretor, was Decern'd by the Lords of Seſſion to perform, albeit the time for Buying of Tithes had elapſed. (*a*) The Commiſſion 1690, put He-

(a) *February* 1682. *Crauford of Ardmillan againſt the Lord Bargany.*

retors

retors under no Restriction of time in Buying of their Tithes. (a)

5. Where Lands are Liferented, the Heretor purchasing his Tithes, must give the Liferenter the Leading and Drawing for payment of the valued Duty. (b)

6. Tho all Tithes indiscriminately may now be valued: (c) Yet severals are of that Nature that they cannot be bought. Herein our present Constitution doth vary a little from former Practice. The common Benefit allowed to Heretors of Buying their own Tithes was once not competent for any possess'd by Ecclesiastical Titulars, the time of the Surrender: unless when under Tack in the Hands of others. In which case it was Determin'd by King *Charles* the first's Letter, that Heretors should have the Buying of their Tithes set by Bishops, or Beneficed Persons to Tacksmen; Or might purchase the Tacks, if the Beneficed Person refus'd to do it. For he was allowed the Prerogative of buying for the use of the Church. And then notwithstanding the Heretors so buying his Tithes; it was intire to the Ecclesiastick Titular to claim at the Ish of the Tack, the Benefit of the Act of Parliament, (d) And of the Reservation in the Clergies Submission; whereby the Tithes in their Possession were exeemed from Buying or Valuing. But now

(a) *Act* 30. *Sess.* 2 *Par. W. and M.* (b) *Acts* 17. *and* 19. *Par.* 1633. (c) *Act* 30. *Sess.* 2. *Par. W. and M.* (d) *Act* 17. *Par.* 1633.

the

the Regulation is, that no Tithes can be bought that are either poſſeſt by Miniſters for their Stipends; (a) Or belong to the Queen by the Aboliſhing of Prelacy, ſo long as they remain Undiſponed; Or that are appropriate to Colleges, Hoſpitals, or other pious Uſes; Or that once pertained to the Heretor, who Diſpon'd the Lands without, or Reſerving the Tithes. (b) The Reaſon of this laſt Exception is plain: For an Heretor who, having Stock and Tithe in his own Perſon, Feued only the Lands, ſhould no more be Oblig'd to Sell his Tithes, than a Superior his Feu-duties, or an Heretor any Right of Property reſerv'd by him when he ſold his Lands.

7. It was lately contraverted, if the Tithe of Fiſhes taken in *alto Mari*, might be valued and bought at the inſtance of the Heretor of the Ground where the Boats landed? It was alledged for the *Negative*, that the Act of Parliament provides only for the Valuation of the Tithes of Lands; And the Tithe of Fiſhes could not be called the Tithe of the Lands where they were unloaded. For, 1. The Stock which anſwers to that Tithe is not at all Predial, or maintained by the Strength of the Heretor's Ground; Nor yet is it the Product of his Tenents Induſtry; And being exacted of all Strangers, could not be called the Heretor's Tithe. 2. All the Title the Heretor

(a) *Act* 30. *Seſſ*: 2. *Parl*: *W. & M.* (b) *Act* 24. *Seſſ*: 4. *Ibid.*

had,

had, was only a Right to the Harbour and Port; Which carries the benefit of the Custom, but no Right to Fish imported, more than to the Property of a Loading of *East-India* Ware. Nay, he could not set Tacks of the Fish of the Sea as being accidental, and the Sea *juris publici*, wherein he could not hinder his Tenents to fish without oppression. But yet it was found that these Tithes might be valued and bought, (*a*) for these Reasons. 1. The Teind-fish is not valued as taken *in alto mari*, more than the Custom of Goods is due, while the Ship is out at Sea. But as Custom for these is due upon the landing of the Ship: So the Teind Fish is exacted when the Boats come to Shore, by vertue of their Landing. And therefore the Heretor had Interest to value the same, as well as the Vicarage-teind of any other Goods upon his Ground: But this is not simply upon the account that he furnished the Boats with a Harbour. For as the Teind becomes due *ipso momento*, that the Boats land upon any part of his Ground, albeit there were no Harbour: So the Heretor has Right to seek the same valued. Custom and Teind again, are different Casualities, consistent together: So as the Heretor may both value the Teind and exact the Custom. Nor are any other imported Goods save Fish lyable to a Teind. 2. That which may be set in Tack

(a) 22. *July* 1702. *Sir James Hall of Dunglass against the Moderator of the Presbytry of Dunbar, Lord Alexander Hay, &c.*

for

for a certain Duty, may be valued and bought: And it's the ordinary cuſtom throughout the Coaſt-ſide, for every Boat to pay, ſome two, ſome four, ſome ſix pounds *Scots*, ſome leſs and ſome more yearly, for the Teind-fiſh *communibus annis*, one year with another. 3. Albeit the Heretor of the Ground where the Boats land had no Right to the Stock of the Fiſh, he may value the Teind. For he hath no Right to the Stock of his Tenents Goods, and yet hath a good Intereſt to purſue a Valuation of the Vicarage-teind. 4. It's no relevant Objection againſt the valuing of Teind-Fiſh that the ſame is caſual and uncertain: For all Vicarage-tithes are ſuch for the moſt part, and yet may be valued; Yea, *jactus retis* is valuable. 5. If the Teind-fiſh ſhould be allocat to the Miniſter as a part of his modified Stipend, they behov'd to be valued: Otherways there could be no clear Locality; And the Heretors of the Pariſh could not know how far the modified Stipend is ſatisfied, and what Free-teind they have to buy.

8. Albeit a Sale of Tithes purſued upon the Act of Parliament is only competent before the Commiſſion: Yet a purſuit upon a promiſe or conventional Obligation to ſell Tithes was ſuſtained before the Lords of Seſſion, who ordain'd them to be ſold at the Rate preſcrib'd in the Act of Parliament; and remitted to one of their Number to determine the price: (*a*) Since the valuing and ſelling of

(*a*) *February* 1682. *Crawfurd of Ardmillan againſt the Lord Bargany.*

Tithes

Tithes is much the general Intereſt of the Nation; And yet but little progreſs is therein made through the unfrequent ſitting of the Commiſſion, to which Court the Determination in theſe Matters is thirled: It were not amiſs that the Parliament would authorize the Lords of Seſſion to value and ſell Tithes; Eſpecially ſeing the rate and price of them are already fix'd and determin'd by Law.

SECT. V.

Of Actions for Uniting, or Annexing and Dividing Pariſh-Churches, for Erecting of new Churches, and altering the Situation of others:

AS *Juſtinian* for Reaſons of State did conjoin ſeveral Magiſtracies and Juriſdictions: (*a*) So Eccleſiaſtick Benefices have been frequently united upon Motives of Convenience and Advantage to the Church. As when two Churches ly ſo near together, and the Bounds of their Pariſhes are ſo narrow, that one perſon may conveniently ſupply the Cure in both; Or, when both Stipends are but a competent Maintenance to one Miniſter. By the Canon Law the Pope only could Con-

(a) *Novi* 8, 24, 25, 26, 27, 28, 29.

ſolidate

ſolidate two Biſhopricks or larger Benefices into one: (*a*) But the conjoyning of Pariſh-Churches was permitted to the ordinary, (*b*) with conſent of his Chapter. (*c*) The Pope us'd frequently to unite Parſonages and other inferior Benefices to Biſhopricks, upon pretext of their meanneſs: Which Benefices at the Reformation were ordained to be provided again with particular Miniſters, whereof the Rents and Stipends were reſerv'd in the Gifts and Proviſions of the Titular Biſhops then made. The Canon Law doth not allow the uniting of Benefices lying within different Dioceſes. (*d*) Nor of Benefices Patronate, either with others of that kind, or with Free Benefices. (*e*)

2. *Scotſmen* went frequently to *Rome* to get Benefices united, whereby much of the Nations Stock was exhauſted and carried thither. This oblig'd the Parliament to diſcharge all Union of Benefices, and declare the purchaſing thereof Treaſon. (*f*) But now the Uniting of Pariſhes is allowed, and the Commiſſion are the proper and ſole Judges thereto. By the Union of two whole Pariſhes, ſometimes one of the Churches is ſuppreſs'd, and the other declared to be the common Church for all the Pariſhioners within the united Bounds.

(a) *C. quod tranſlationem 4. Extr: de officio Legati: C. decimas in fin: 16. qu. 1.* (b) *C. ſicut unire 8. Ext: de Exceſſibus prælatorum.* (c) *C. dudum 1. de rebus Eccleſiæ non alienandis in 6.* (d) *Bengæus de beneficiis ad vocabulum quædam cap: 3. §. 3. N. 5.* (e) *Ibid: N. 6, 7.* (f) *Act 44. Parl: 6. Ja: 3.*

So,

So, the Parish of *Perstoun* at the Instance of the Earl of *Eglingtoun*, was annex'd to the Church of *Dreghorn*: Both being small Parishes, having mean Stipends, and none of the Lands of *Perstoun* lying beyond two Miles and a half from the said Church. (*a*) So the Kirks of *Innerarity* and *Meathie* having been Fourty Years serv'd by one Minister, the Lords upon Representation that the Church of *Innerarity* was seated in the middle of both Parishes, and that *Meathie* Church was Ruinous; united them with consent of the Heretors. (*b*) And if neither of the united Churches be in a place where the Generality of the Parishioners may easily repair to; then both are demolished, and a new one erected about the Center of the common Parish. Sometimes two Parishes are so united, that both Churches are kept up to be serv'd by one Minister Alternatively; who preaches in each of 'em, only every other Sabbath. Such was the case of the Parishes of *Chanery* and *Rosemarkie*: But in regard at the Union the Church of *Chanery* was Ruinous, and that of *Rosemarkie* had been lately Repaired; The Heretors were declared lyable only to repair and maintain their own respective Churches. (*c*) When Patronage obtained, and Churches belonging to different Patrons came to be united, they were allowed to present Ministers *alternis vicibus*, or by turns: (*d*)

(a) 26. *February* 1668. (b) 24. *July* 1667. (c) *February* 2. 1670. *John Bishop of Ross.* (d) *Act* 3. *Parl.* 22. *Ja.* 6.

And

And the Patron of the greater Benefice to be the firſt Preſenter. (*a*) Becauſe the leſſer being always annex'd to the greater, that remains the Principal and Mother Church. (*b*) But if one was ſuffered to preſent thrice ſucceſſively without being queſtion'd, he acquired thereby a Poſſeſſory Title to preſent for the next time alſo: Tho the other Patron might have declar'd his Right for the future. (*c*) According to the Canon Law, no Temporary Union of Benefices could be made, as during any perſons Life. (*d*) For, *Dum agitur de cauſis faciendæ Unionis, maxime Cavendum eſt ne perſonæ magis quam Eccleſiæ favor attendatur.* (*e*)

3. Sometimes a larger Pariſh is diſmembred of ſome Lands, to make up another. And theſe are often annex'd *quoad curam animarum* only: As the Lands of *Newhaven* are united to the Pariſh of *North-Leith*, and yet pay Stipend to the Weſt-church at *Edinburgh*. Such Annexation transferrs only *curam animarum*, when there is not as much Free-teind of the Lands behind, as will compenſe the Miniſters loſs in his Stipend by the Diſmembration. But if there be, then the disjoin'd Lands become a Subject affectable by a Stipend to the Incumbent whoſe Pariſh they're annex'd to.

(a) *Mackenzie Obſerv: on the ſaid Act.* (b) *Arg: C. recolentes 3. Ext: de ſtatu monachorum.* (c) *Mackenzie Obſerv: on the 7 Act 1. Parl: Ja: 6.* (d) *Bengæus de benefic: ad vocabulum quædam cap: 3. §. 2. N. 8.* (e) *Arg: cap: 1. verſ: maxime ne plus faviſſe perſonæ Ext: ne ſede vac: aliq: innov: Bengæus Ibid: N. 7.*

(*a*) Lands

(a) Lands are frequently dissolv'd from one Parish and annex'd to another, upon the account of a nearer and more easie access to the Church. So, *Thomas Elphingston* of *Calderhal* obtain'd his Lands of *Carsie* dismembred from the Parish of St. *Ninian*; In respect of their distance from the Church, and the Ways being Impassible through Moss, Sea-tides, and broken Bridges: And got them annex'd to the Parish of *Airth*. (b) Mr. *John Malcom* of *Balbedie* got his Lands disjoin'd from the Parish of *Auchterdiran*, and annex'd to *Ballingrie*, upon his Petition and an Act of the Presbytry of *Kirkaldie*, finding the Alteration necessary and convenient: Without prejudice to the Minister of *Auchterdiran*'s Interest. (c) The Earl of *Kincardin* procur'd a Dismembration of his Lands of *Kincardin* from the Parish of *Culross*, and got them annex'd to *Tulliallan*, upon a Report of the Presbytry recommending the thing as fit to be done. Some Lands being dismembred from one Parish, and added to another within a different Diocie, the Dismembration was reduced, in respect it was not only a Derogation to the Jurisdiction of one Bishop in favours of another; But also did cut off the former Minister from so much of Stipend as the Free-teind of his Parish could not make up. (d) Another Decreet obtain'd in the year 1650, dismembring the Lands of *Lambertoun* from *Ayton*-Church, and annexing them

(a) *Vid: sup: sect:* 2. *N.* 4. (b) *February* 15. 1665. (c) 21. *July* 1669. (d) *February* 19. 1662. *Earl of Kinghorn and others, against Walker Minister at Auchtertool.*

to *Mordingtoun*, was reduc'd for not production upon theſe Reaſons; 1. The Lands annex'd lay more convenient to the Parish-church they were taken from. 2. The Stipend thereof by the Diſunion was rendered very inconſiderable; Nor was the Miniſter of *Aytoun* called to the pronouncing of that Decreet. And 3. The King as Patron was prejudg'd. (*a*) of which Decreet Reductive there being a Reduction purſued by the Miniſter of *Mordingtoun* upon theſe Reaſons; 1. The Decreet in the year 1650 was juſt, having proceeded upon a Perambulation conform to the Act of Parliament, and the Presbytries Report of the convenience and neceſſity thereof, and the Heretors Supplication. To which the Miniſter of *Aytoun* could not then be called, in reſpect the Church was vacant at the time: And there was abundance of Teind in the Parish to make up his loſs by the Diſ-union. 2. If *Lambertoun* continue united to *Aytoun*, *Longformacus* ſhould return to *Mordingtoun* from whence it was disjoin'd: As in the caſe of Benefices excambed, whereof by Law the one ſtands bound for the other. And 3. The King had no prejudice. The Lords of Commiſſion aſſoilzied from the Reduction in ſo far as concerned the Diſmembration, and reduc'd *quoad* the Stipend payable out of the Disjoin'd Lands. Which they ordain'd to be equally divided betwixt the Miniſters of *Aytoun* and *Mordingtoun*: But the Miniſter of *Aytoun* was not found ly-

(a) *February* 25. 1663. *Hume Miniſter of Aytoun againſt Ramſay Miniſter of Mordingtoun and others.*

able

able to reſtore or hold compt for any part of his Intromiſſion therewith during the ſtanding of the former Decreet of Reduction. (*a*) But thereafter, (*b*) it being inſtructed that the Stipend formerly due to the Miniſter of *Mordingtoun* out of *Longformacus* before the diſmembration on't, was equivalent to that payable out of the Lands of *Lambertoun*; They annex'd the ſaid Stipend to *Mordingtoun*.

4. As the Smalneſs of the Charge and Stipends, with the Contiguity and Nearneſs of Churches, are the ordinary Conſiderations for turning two into one: So where Pariſhes are ſo wide and far extended, that the Inhabitants in the remoter parts, by their Diſtance from the Church, or the Interjection of Waters, cannot have Acceſs, upon all Occaſions, to partake in the Adminiſtration of the Divine Ordinances; The common Remedy is, to make of one two Pariſhes, and build another Church in a convenient place for the new Erection. And this is conform to the Canon Law. (*c*) A Decreet erecting a new Church at the Caſtle of *Cummock*, and modifying a Stipend thereto, out of the Lands and Tithes whereof the Earl of *Dumfreis* was Titular and Tackſman, was reduc'd; in regard it did not bear, that he was ſummoned, and the reſt of the Heretors conſented, that the two Churches might be re-united in one. (*d*) An Erection of ſome Lands into a Pariſh by the

(a) *February* 22: 1671. (b) *in July* 1673. (c) *C: præcipimus § ſicut duo* 16: *Qu:* 1. (d) *July* 24: 1667.

Presbytery was reduc'd ſummarly upon a Supplication, as being *ipſo facto* null: (*a*) For the Presbytery has no power to erect, but only to repreſent the Conveniency thereof to the Commiſſion. Orders for building of new Churches have ſometimes been obtain'd from the Commiſſion, upon a Bill given in to them, with the Presbyteries Recommendation; and ſometimes upon Report of a Viſitation appointed by themſelves. Mr. *James Row* Miniſter at the United Kirks of *Strowan* and *Monivaird* having purſu'd his Pariſhioners for building him a Church; The Lords of Commiſſion (*b*) recommended to the Biſhop of *Dumblane* to conſider the Situation of the Pariſh, and where it might be built moſt conveniently. Upon whoſe Report, the Church was ordain'd to be erected at *Enoch*, to ſerve both Pariſhes, and the Heretors to ſtent themſelves for that effect: With Certification, if it were not built betwixt and *Whitſunday* 1668, the preſent Church of *Strowan* ſhould be the common Church for both Pariſhes; and publick Worſhip was appointed to be perform'd in the mean time as formerly.

5. Where a Church is found to be incommodiouſly ſeated, an Order of Commiſſion may be got, upon Application of the Pariſhioners, or the majority and moſt conſiderable of 'em, for ſetting up another in a more proper place about the middle of the Pariſh, and declaring the ſame, when built, to be the only

(*a*) *January* 22: 1662. (*b*) *January* 29: 1667.

Church

Church of the Pariſh: They giving Security for building the new Church as good as the former; whereof no Expenſe ſhould be laid upon thoſe of the Pariſh, who expreſs'd their Diſſent from the Tranſplanting, by Proteſting againſt it. (*a*) The Pariſh Church of *Ochiltrie* being Tranſported as Incommodious to ſundry of the Heretors, and a Locality ſettled to the Miniſter with a Glebe, Manſe, and Graſs adjacent to the new Church; The Lord *Stair* was declared Patron, and the Glebe given to *Cunninghame* of *Brounhill*, in lieu of his Right of Patronage of the ſuppreſt Church of *Barnvile*. (*b*) A Warrand obtain'd for changing the Seat of the Church of *Haſſindean* was reſcinded, and counter Orders given to demoliſh the Church, and tranſport the Materials to a more proper place near *Bruxholm*, for building it there *de novo*. In regard the firſt Remove was made only to gratifie ſome particular perſons, and found incommodious to moſt of the Pariſhioners: Which was atteſted by the Arch-Biſhop of *Glaſgow*. And Letters were ordain'd to be iſſued out at the Inſtance of Sir *William Purves* the Church-Solicitor, for charging the Heretors to meet and ſtent themſelves, and name a Collector. (*c*)

6. Sometimes Pariſh Churches are Erected, Tranſplanted, United, and Divided, by the Parliament. As the North Church of *Leith*

(a) *February* 12: 1673: *Lord Bargany contra Cathcart of Carleton and Boid of Pinkel.* (b) *July* 19: 1673. (c) *July* 25: 1666: *Duke and Dutcheſs of Buccleugh againſt Scot of Haychеſters and others.*

was erected into a Parish Church by the 18. *Parl. J. 6*: (*a*) And the Church of *Ballintrae* by his 22. *Parl.* (*b*) The Church of *Gullane* was translated to *Dirletoun* by the Parliament 1612. Sometimes the Parliament, upon Application made to them, refer'd the Determination absolutely to the Commission: As was done with the Petitions of the Parishioners of *Roseneath*, desiring their Church to be transported out of the Isle of *Roseneath* to the Lands of *Ardinconnel*, as a more convenient place; of *John* Earl of *Wigtoun*, and other Parishioners of the Parish of *Leinzie*, craving the Seat of their Church might be chang'd from the west end of the Parish. to some more commodious part near the middle; and of *John* Lord *Hay* of *Yester*, and the possessors of the Lands of *Rodonno*, for declaring these Lands to be a part of the Parish of *Lyns*, and for a Warrand to the said Lord *Hay* to build a Church upon the most convenient place of his Lands of *Rodonno* or *Megget*, for serving the Inhabitants at such times as they might be hindered by Storm from coming to the Church of *Lyns*; and of the Minister of *Christs-Kirk* at *Udney*, desiring to be sufficiently provided with a constant Local Stipend. (*c*) Sometimes the Parliament remitted such matters brought before them to the Commission with particular Instructions: As they did with the Petition of *Thomas Burnet* of *Leyes*, craving a new Church to be erected within the Parish of *Fettereſſo*. (*d*)

(a) *Anno* 1606. (b) 1617. (c) *Act* 5: *Parl*: 23: *J*: 6. (d) *Ibid*.

7: As

7. As the Commiſſion is the only Judicature having power to model and allocat Stipends to Miniſters; value and ſell Tithes; annex, unite and divide Pariſhes; erect new Churches, and alter the Situation of others: So theſe things being done, the Lords of Seſſion are the proper Judges for diſcuſſing emergent points of Right; which gives me a fair Hint to paſs to Actions competent before them touching Miniſters Stipends, and Tithes.

CHAP. X.

Of Actions for Miniſters Stipends before the Lords of Seſſion.

HERARD Arch-Biſhop of *Tours* wou'd not have Miniſters purſue for Tithes, or procure their payment by force. (a) But in this corrupt Age, there is often a neceſſity upon them to uſe the Remedy of Law againſt ſuch as unjuſtly withhold their Stipends.

2. Miniſters with us are either maintained out of the Tithes of their Pariſhes, or are ſimple Stipendiaries. The former again are either left to the proviſion of the common Law, or are provided by Decreets of the Commiſſion.

(a) *Thomaſſin la Diſcipline del'Egliſe, Part* 3: *Liv*: 3: *Chap*: 1: *N*: 5.

3. By

3. By Miniſters, whom only the common Law provides, I mean ſuch as are in poſſeſſion of Benefices by virtue of the 102. *Act, Parl.* 1581. Who have the ſame Right to the Tithes of their reſpective Pariſhes, as the Popiſh Eccleſiaſticks had before the Reformation. (*a*) And may purſue Actions Petitory and Poſſeſſory, and Actions of Spuilzie, as well as any other Teind Maſters. The benefit of a Poſſeſſory Judgment is competent to them upon ſeven Years quiet poſſeſſion, without any other Title. (*b*) And thirteen Years poſſeſſion is a preſumptive Title. (*c*) But now the Acts of Parliament 1690 and 1693 have given to Patrons the Right of Reverſion of theſe Benefices, by whom they are redeemable from the Incumbents, upon their getting competent Stipends modified by Law.

4. Miniſters whoſe Stipends are eſtabliſhed by Decreets of the Commiſſion, have either Modifications only, or Modifications and Localities.

5. When a Miniſters Stipend is only modified, it affects the whole Tithes out of which it is modified; and may be exacted from any Heretor intromitting, or poſſeſſor, whoſe Tithes will go ſo far; or ſo much on't according to their Extent. (*d*) Or from an Appry-

(a) *Stair Inſtit: Lib:* 2: *Tit:* 8: § 26. (b) *November* 25: 1665: *Peter contra* Mitchelſon, *July* 18: 1671: *Earl of Hume contra* Laird *of Ryſlaw, December* 6: 1672: *Veatch contra Weatherlie.* (c) *Hope Improbation, Biſhop of Galloway contra the Prebendaries of the Chappel Royal.* (d) *July* 6: 1625: *Mortoun contra Scot of Harden. December* 3: 1664: *Hutchiſon contra Earl of Caſſils.*

ſer

ſer who might have intrometted. (*a*) Nor was a Miniſters accepting a Precept not expreſly in full ſatisfaction, found to liberat the Heretor, except for what was receiv'd by virtue thereof. (*b*) Yea there is Action competent to the Miniſter for his Stipend, even againſt the Tenents paying *bona fide* a joint Duty for Stock and Teind. (*c*) Nay, what's yet more, the Duty of a Back-Tack ſet by a Wadſetter of Stock and Teind for his Annualrent only, was not exeemed from the Miniſters pretenſions. (*d*) Where a Parſon having ſet a Tack of the Tithes of his Pariſh to one of the Heretors, who wadſet ſome of his Land with the Tithes thereof, and got from the Wadſetter a Back-Tack for payment of the Annualrent of the Money for which the Wadſet was given: The Parſon was found to have good Intereſt to require the Tack Duty, as a part of his Stipend, from whatſoever Intrometter with the Tithes of the Pariſh, effeiring to the Extent of their Intromiſſion; and not obliged either to ſeek the Duty in parcels from every particular Medler, or yet to be reſtricted to his own Tackſman; And the receiving of the Wadſet of Stock and Teind with the back-ſetting of both, ſuſtain'd to make the Wadſetter liable to the Parſon as Intromettor with the Teinds, for ſo much of the Tack Duty as the Wadſet Teinds did extend to.

(a) *December* 20: 1622: *Preſtoun contra the Miniſter of* (b) *November* 9: 1677: *Rutherfoord contra Murray.* (c) *February* 19: 1629: *Kirk contra Gilchriſt.* (d) *March* 21: 1633: *Keith contra Gray and Carmichael.*

But

But afterward (*a*) it was found, that the Wadsetter, as deriving Right from the principal Tacksmen, was not liable to pay the whole Tack Duty to the Parson, but only that proportion which the Wadset Lands were in use to pay before the Tack of Rental Bolls; the taking whereof, without Inhibition us'd, was no Interruption of old use of payment against him the Wadsetter, albeit it was sufficient against the principal Tacksman himself. But then the Heretor, Appryser or Wadsetter distress'd gets a proportional Relief off the rest; and Tenents an intire Relief off their Master.

6. Though when a Stipend is only modified out of the Tithes of a Parish, 'tis a Burden affecting the whole: Yet when the Tithes of certain Lands are allocat for payment of it, Intrometters only with these Tithes are liable. (*b*). And the Minister has no Title to any Tithes without the Bounds of his Locality. (*c*) But yet a Minister was not bound up by a Decreet of Locality never own'd by him or his Predeceessors, from seeking a larger Stipend out of the Tithes of his Parish conform to thirteen Years peaceable possession. (*d*) A Charge upon a Decreet of Locality for three Chalders of Victual was sustained to the Minister, although no Victual was payed in the Parish. (*e*) And a Stipend being local'd up-

(a) *July* 23: 1633. *Inter eosdem.* (b) *Stair Instit: Lib:* 2: *Tit:* 8 § 30. (c) *Arg: Dec: January* 19: 1669: *Earl of Athole contra Robertson of Strowan.* (d) *November* 1676: *Semple contra his Parishioners.* (e) *Aikman Minister at Dalmellingtoun against Cunninghame of Milcraig.*

on

on a Tackſman of Tithes, a ſingular Succeſſor to the Right of 'em was found liable in payment. (*a*) A Miniſter having charg'd for payment of the Bolls contained in his Decreet of Locality, the Debtor was ordained to depone upon the prices he got: Albeit he had offered the Fiars, by way of Inſtrument, within ſeven days after the Charge; and produced Receipts of the Charger and his Predeceſſors for inſtructing, that they were not in uſe to uplift the Bolls *in ipſis corporibus.* (*b*) It being highly unreaſonable, to oblige a Miniſter to accept the Fiars, who buyes Victual himſelf at Mercat Rates. But a Miniſter having accepted a Precept for his Stipend-Bolls from the Titular of the Tithes upon an Heretor of the Pariſh, who entered in payment after the ordinary time of delivering the Stipend was paſt, but did not ſatisfy the whole; and the Titular having upon a Charge made Offer of the remaining Bolls under Form of Inſtrument, which the Miniſter refus'd: He the Titular was only found liable according to the Fiars. (*c*)

7. The Bolls in a Miniſters Decreet of modification or Locality ſhould be payed conform to *Linlithgow* Meaſure, if no Meaſure be therein ſpecified: Unleſs the Miniſter hath been thirteen Years in Poſſeſſion of uplifting according to another Meaſure; or the modi-

(*a*) *Inter eoſdem.* (b) *February* 21: 1699 *Houiſon Miniſter of Inverask againſt Sir William Sharp.* (c) *February* 7: 1705: *Liver Miniſter at Mertoun againſt Haliburtoun of Newmains.*

fied

fied Stipend would fall ſhort of the Quantity in the Act of Parliament by *Linlithgow* Meaſure. For in ſuch a Caſe the Lords found, that the Miniſter ought to be pay'd conform to the Meaſure of the Shire, within which the Pariſh lay. (*a*)

8. Where, in Infeftments of Erection, the *Reddendo* is a Blench Duty, and ſo much beſide for Stipend to the Miniſter, ſuch a Stipend is not *Debitum Fundi*, ſeing the *Reddendo* relates not to Lands, but to Teinds, which are only a Benefit ariſing out of the Lands, and ſo no more affects the Ground than Teinds do.

9. Miniſters are ſometimes oblig'd to purſue not only for payment of their Stipends; but even for the Sum that is modified for Communion Elements. To pay which the Heretors are liable, tho the Communion be not adminiſtrated. (*b*) But according to Sir *George Mackenzie*, (*c*) it ſhould be given to the Poor in that Caſe, and not to the Miniſter. Yet he has then the Application. So a Miniſter purſuing for payment of a Sum modified in his Decreet of Locality for Communion Elements obtain'd Decreet upon an Offer to put it in the Poors Box of the Pariſh. (*d*)

10. Simple Stipendiary Miniſters are thoſe within Burgh, who having no Landwart Pariſh, or being only ſecond Miniſters where the firſt have the Tithes, are maintain'd upon Gifts and Mortifications; or a voluntary Con-

(a) *June* 27: 1667: *Miniſter of Dalrymple contra Earl of Caſſils.* (b) *Act* 54: *Parl*: 3: *J*: 6. (c) *Obſerv*: *on the ſaid Act.* (d) *November* 29: 1679: *Birnie contra Earl of Nithſdale.*

tribution

tribution of the Inhabitants; or Annuities laid upon them by Order of Parliament, according to the proportion of Houſe Rent they pay. Stranger-Inhabitants within Burgh who are not Burgeſſes, but have Advantage by the Miniſtry, may be ſtented for Stipend. But all Members of the Colledge of Juſtice are priviledg'd. (*a*) The priviledges and Immunities of the Colledge of Juſtice are of a Date with the Inſtitution thereof, and have been ſince ratified by many Acts of Parliament; particularly by the only Act of Queen *Mary*'s ſecond Parliament, which ſeems to have been conveen'd for that ſole end. Their ſpecial priviledges within the Town of *Edinburgh*, and Liberties thereof, were declared by the Lords of Seſſion *in foro contentioſo*: (*b*) Among which the Immunity from payment of Annuity for the Miniſters Stipends is expreſly reckon'd. And upon that Decreet of Declarator an Act of *Sederunt* was made. A Burgh was found to have no power to ſtent their Heretors for any part of a ſecond Miniſters Stipend, not due by Law, Conſent of Party, or Preſcription. (*c*) The priviledge of *Decennalis & Triennalis Poſſeſſio* was not found competent to the Miniſters of *Edinburgh*, upon thirteen Years payment of an Annuity, effeiring to Six of the Hundred of the Rents of the Houſes; albeit the ſaid Annuity was deſtin'd by Act of Parliament as the Fund of their Sti-

(a) *Act* 276: *Parl*: 15: *Ja*: 6: *Mackenzie Obſerv*: *on the ſaid Act*. (b) *February* 23: 1687. (c) *July* 22: 1668: *February* 1: 1669: *Boſwal contra Town of Kirkaldie*.

pends;

pends: In regard they neither had Right thereto *Jure Communi*, but only *ex Proviſione Hominis*; nor was it payed to themſelves, but to the Town for their behoof. And it might have been applyed to another uſe: Since the Miniſters Proviſion was not reſtricted to the Annuity; but the Town was liable to them for ſuch a Sum yearly, which, tho no Annuity were recovered off the Inhabitants, behov'd to be made up out of the Common Good. (*a*) An Heretor who oblig'd himſelf to pay the Miniſters whole Stipend, and to relieve another thereof, was only found liable for the proportion of Stipend payable to the Miniſter the time of the Obligement, and not for poſterior Augmentations. (*b*)

11. Miniſters heretofore were in uſe to procure Decreets conform upon Decreets of Locality obtained by their Predeceſſors; which piece of Diligence being found unneceſſary, inconvenient, and chargeable: An Act of *Sederunt* was made, (*c*) declaring it needleſs for any Miniſter to ſeek for a Decreet conform upon his Predeceſſors Decreet of Locality; and that upon a common Bill given in by a Miniſter with his Act of Admiſſion, and Decreet of Locality, tho obtain'd by his Predeceſſors, Horning might paſs againſt thoſe liable for his Stipend. General Letters of Horning (that is, which do not expreſs *nominatim* the perſons to be charg'd) are allowed, for Im-

(a) *February* 23: 1687: *The Members of the College of Juſtice againſt the Town of Edinburgh.* (b) *January* 1688: *Mackenzie contra Viſcount of Oxfoord.* (c) *June* 22: 1687.

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plement of Decreets of Locality. (a) And these Letters are effectual, not only against the persons decerned in the Decreets, but also against their Heirs and Singular Successors possessing the Lands affected with the Localities. (b) But Summar Horning was not sustain'd at the Instance of a Ministers Executor for his Stipend. (c) Ministers poinding for their Stipends, need not to carry the Goods to the Mercat-Cross of the Head Burgh of the proper Jurisdiction; but may comprise them on the Ground where they are by honest sworn Men. (d) No Suspension of special Decreets for Ministers Stipends can pass, except upon Production of Discharges, or upon Consignation of the Sums charg'd for, and if Victual be the Subject of the Charge, 100 Merks must be consign'd for each Chalder, and proportionally, where less than a Chalder is charged: Without prejudice to the Lords of Session to modifie more or less at the discussing. (e) Actions for Ministers Stipends commenc'd in inferior Courts cannot be Advocated; Suspensions of and Actions for them before the Session are discuss'd summarly, without running the Course of the Roll; and Suspenders, against whom Letters are found orderly proceeded, should be decern'd in a fifth part more

(a) *Act* 13: *Sess.* 2: *Parl: W: and M.* (b) *Stair Instit: Lib:* 4: *Tit.* 47: § 4. (c) *December* 17: 1623: *Relict of the Minister of Livingstoun contra Parishioners.* (d) *Act* 21; *Sess:* 3: *Parl:* 1: *Ch:* 21 (e) *Act* 6: *Sess:* 1: *Parl:* 2: *Ch:* 2.

at

at leaſt, than the Sums charg'd, for Expenſes and Dammage. (*a*)

12. 'Tis no good Reaſon againſt the payment of a Miniſters Stipend, that he is Rich and otherways well to live in the World. (*b*) The Quakers cannot comprehend why any should be obliged to contribute to a Miniſters Maintenance; but ſuch as are taught by him. Which perverſe Notion gave riſe to the merry Conceit of the Barber, who pretended as good Right to Shaving-money from the Parſon to whom he never performed his Office; As he the Parſon had to claim any part of his Stipend from him, who, though a Pariſhioner, came never to Church, and had no Benefit by the Preaching or other Miniſterial Duties. As if forſooth Men were left equally indifferent in the choice of their Miniſter and Barber: A fancy ſo abſurd, as none can digeſt, but a Set of Men who have no other than *Jeroboam*'s Ordination among them. (*c*) Theſe people, (who don't judge of things from the Principles of Reaſon and Juſtice, but by an unaccountable Light within them) pretend their Conſcience does not allow them to pay Tithes to a Miniſter. Some of 'em are ſo obſtinate in the Matter, that rather than do it, they will go to Priſon and ly there; Others who are more peaceable, chuſe to pay their Land-lord more Rent, that he may free them from Tithing.

(a) *Act* 27. *Seſſ*: 5. *Parl*: *W.* & M. (b) *Bruneman*: *de jure Eccleſ*: *lib*: 2. *cap*: 5: *N.* 1. (c) 1 *Kings*. 13. & 33.

13. As

13. As our Law has indulg'd to Miniſters ſummar and priviledg'd Execution, for making their Stipends effectual by payment; For that they are commonly ſuppos'd not to have much to depend upon beſide their Stipends, and conſequently unable to want 'em long: So Stipends not purſued within five years preſcribe *quoad modum probandi*; 'cauſe after that time they are preſum'd to be pay'd; unleſs the preſumption can be taken off by the Debtors Oath, or by Writ. (*a*) Nor was a mortified Stipend exeem'd from this Quinquennial Preſcription. (*b*) An Heretor being purſued for payment of a proportion of the Miniſters Stipend ſpecially localled upon the Lands of other Heretors, and uplifted from them by the Defender's Predeceſſors: He alledged Preſcription upon the 9. *Act Parl.* 1669. And if the Claim preſcriv'd as to thoſe principally lyable, it cannot ſubſiſt againſt any Intromet-ter; unleſs it be proven by the Oaths of the principal Parties, that their proportions of the Stipend are ſtill reſting. For payment to the Purſuer would not aſſoilzie at the hands of the Heretors whoſe Teinds were intrometted with *ſine titulo*. In regard they could not be bound to allow a Debt againſt which themſelves were ſecur'd by preſcription. It was Reply'd, That the Defender was not purſued as immediately lyable for the Stipend, but as having in his hand *ſine cauſa*

(a) *Act* 9. *Seſſ.* 1. *Parl.* 2, *Ch.* 2. (b) *Mackenzie Obſerv: on the ſaid Act.*

theſe quantities of Money and Victual payable to the Miniſter by other Heretors: In ſo far as he took up the whole Tithes of the Parish, notwithſtanding the Miniſter's Decreet of Locality. And as a Miniſters Factor would certainly be lyable much longer than five years to hold compt for Stipend uplifted by him: So this Action founded upon the common ground of Law, *quod nemo debet alieno damno locupletari*, ſhould run the courſe of long Preſcription againſt the Defender as Intrometter, *negotiorum geſtor*, or ſomething leſs favourable. And the Difficulty ſuppos'd in caſe the Heretor ſhould purſue Repetition, is imaginary. For albeit within the five years they might have purſued the Defender either to refound, or to procure the Miniſter's Diſcharge; they had no longer Intereſt after elapſing of the *Quinquennium*. And if the Defender had any fears of being afterwards called to account by them; he ſhould have cited them with the Miniſter in a multiple-poinding, and then the Miniſter would have been prefer'd. The Lords before Anſwer allowed the Purſuer to prove the Defenders Predeceſſors Intromiſſion with the Teinds, and that they were in uſe to pay the Miniſters Stipend. (*a*)

(a) 15. *January* 1704. *Miſtriſs Eccles againſt the Earl of Dundonald.*

CHAP.

CHAP. XI.

Of Actions about Tithes falling under the Cognizance of the Lords of Session.

ACTION in general, as my Lord *Stair* defines it, is *A prosecution by any Party of their Right, in order to a Judicial Determination thereof.* (a) Actions with us are either Petitory, or Possessory, or Declaratory. Petitory Actions are those whereby we pursue Restitution or Delivery of any thing, conform to some Real or Personal Right. In Possessory Actions the Pursuer doth not found upon the Point of Right, but upon Possession only. Declaratory Actions are only for Declaring and Establishing some Right or Possession, without a Conclusion of any thing to be done upon it; And are us'd when there is Competition of Rights. (b)

2. No part of our Law hath furnished more Debate & variety of Action, than the Matter of Tithes: And they have frequently been the Subject of Quarrels. To prevent which, the Privy Council have sometimes interposed to Sequestrate them when contraverted: As was done *September* 1608, with the Tithes of *Dysert*, that the Lord and *Patrick Sinclair* were contending for, which, by Council Letters, ei-

(a) *Instit. lib.* 4. *tit.* 3. §. 20. (b) *Ibid.* §. 47.

ther Party were discharg'd to intromet with, and the Laird of *Bogie* as a Neuter-friend appointed to collect and keep for the behoof of him who should be found to have best Right.

3. There are Petitory and Possessory Actions, and Actions of Spuilzie competent for Tithes: And that not only to Ministers in particular, of which I have treated in the foregoing Chapter; But also to any other Teind-master. A poinding of the Ground is an ordinary Petitory Action proceeding upon an Infeftment of Annualrent out of Lands. But poinding of Tithes at the Instance of a person having Right by Infeftment to an Annuity out of them, was found unwarrantable. (*a*) For though Possessors and Intrometters with the Tithes are lyable to such as have Right thereto, the *ipsa corpora* cannot be poinded. Tithes afford sometimes a Petitory Action according to Tack or Tacite-relocation, or use of payment, which imports a verbal Tack. Tacite-relocation doth not only defend the Possessor from being lyable in any higher Duty for his Tithes, than according to former use of payment; (*b*) But also it is allowed as a good Active Title to pursue for Teind. (*c*) Tacite-relocation or use of payment oblige no longer than both parties continue to acquiesce therein. And therefore it is inter-

(a) *Sir Patrick Hume against the Lady Plendergest.* (b) 28. *November* 1676. *Sheil contra Parishioners of Prestounhaugh. January* 19. 1669. *Earl of Athole contra Robertson of Strowan.* (c) *January* 16. 1663. *Earl of Errol contra Tenents of Urie. Vide supra Chap.* 6. *Sect.* 4. *N.* 13.

rupted

rupted by Inhibition in Parſonage-tithes, and by either Inhibition or Citation in Vicarage, (*a*) at the Inſtance of the Titular, or by an Offer from the Heretor of the draw'n Teind *debito tempore*. But an Offer of the *ipſa corpora* in *April* 1678, was found not to cut off uſe of payment for the Crop 1677. (*b*)

4. Inhibition of Teinds may not only be execute by a Meſſenger, but even by any perſon as Sheriff in that part. (*c*) And moſtly it is done by vertue of a Commiſſar-Order. For Commiſſars are the ordinary, and only inferior Judges, upon whoſe Precepts Inhibition of Teinds is execute. Inhibition is the legal and habile way of interrupting Tacit Relocation, and uſe of payment: Which being once duly raiſed and execute, hath the like Effect, as a Warning againſt the Tenents and Poſſeſſors of Lands, for that and all ſubſequent Years, and makes poſterior Intrometters liable to a Spuilzie. (*d*) But it doth not impower the Titular to draw the Teind by ſummar Violence; which cannot be done before a Sentence obtain'd upon the Inhibition, without incurring the Hazard of a Spuilzie. (*e*) Altho the Uſer of the Inhibition is underſtood to be in the civil Poſſeſſion thereby. (*f*) For the Party may have Reaſons, why

(a) *Stair Ibid. Tit* 24. § 11. (b) *November* 29. 1678. *Birnie contra Earl of Nithſdale*: (c) *January* 27. 1666. *Earl of Eglingtoun againſt the Laird of Cunninghamhead*. (d) *March* 18. 1628. *Lord Blantyre contra Pariſhioners of Bothwel. Stair Ibid: Lib.* 2. *Tit.* 8. § 23. (e) *Ibid.* (f) *Hope Maj. Prait. Tit. Patrimony of the Church.*

his Tithes ought not to be drawn. So, a Tackſman being purſued as guilty of a Spuilzie, for having *brevi manu*, after Inhibition, drawn ſome perſons Teind, to which themſelves pretended Right; the violent Teinding was found unwarrantable: But the Lords deſir'd the Purſuer to reſtrict to Wrongous Intromiſſion, and paſs from the Oath *in Litem*. (*a*) Another was found liable in a Spuilzie, for preſuming to Teind at his own Hand, without Warrand of a Judge, or the Conſent of the Owner of the Corns. Albeit he the Proprietar had no Right to the Teinds, and his own Intromiſſion would have afforded Action of Spuilzie to the other. (*b*) For our Law is ſo far from allowing perſons to right themſelves in any matter at their own Hand, without Order of Law: That an Ejection was ſuſtain'd at the Inſtance of one as Mailler to him, who not only had no Right to the Lands, out of which the Mailler was ejected; but was alſo decern'd to remove at the Ejecters Inſtance; after whoſe removing in Obedience to the Sentence, the Mailler had viciouſly taken Poſſeſſion, and might be conveen'd as an Intruder ſuccceding in the Vice. (*c*)

5. Inhibition of Teinds, like a Warning, is taken off by thereafter accepting the old Duty, or ſome part of it. (*d*) Which, though

(a) *January* 27. 1665. *Lairds of Beirford and Beinſtoun againſt the Lord Kingſtoun.* (b) *Ult. January* 1628. *Naſmith contra Hume.* (c) *November* 21. 1628. *Bruce contra Bruce.* (d) *Stair Ibid.*

it

it be done but for one Year, will ſo far prejudge the Teind Maſter, that he can claim no greater Duty for that or any other Year thereafter; till there be a new Interruption by Inhibition. (a) Yea payment of the old Duty, conform to a Chamberlains Order, was ſuſtained ſufficient to elide an Action of Spuilzie after Inhibition, without neceſſity to alledge, that the Chamberlain had the Purſuers Warrand or Allowance for ſo doing. (b) Although a Warning is not underſtood to be paſt from, but by ſome Deed of the perſon at whoſe Inſtance it was given, or of one having his ſpecial orders to that effect. (c) Nay farther; in a Spuilzie of Teinds, payment of the Kings Taxation impos'd upon them, made by the Defenders to the Purſuers Chamberlain, and by him to his Majeſties Collector, was found a relevant Exception both againſt the Spuilzie and Wrongous Intromiſſion: Notwithſtanding of a preceeding Inhibition; and albeit the Chamberlain had neither his Maſters Warrand for receiving thereof, nor had compted to him for the ſame. (d) But then a Decreet after Inhibition for Rental Teind Bolls, and not a Spuilzie, was not judg'd reduceable upon this Reaſon, *That the Obtainer had receiv'd payment of the Kings Taxation for the Year decerned, and ſo prejudg'd his Inhibition for that Year, for which he cou'd ſeek no*

(a) *March* 25. 1628 *L. Blantyre contra Pariſhioners of Bothwel.*
(b) *Feb.* 13 1627. *E of Linlithgow contra Menzies of Culterraws.*
(c) *March* 5. 1629. *Laird of Ley contra Kirkwood.* (d) *February* 22. 1628. *Lord Loudoun contra Pariſhioners of Killimure.*

more

more than the old Duty formerly in use to be payed: Only the Taxation Money was allowed in satisfaction of the Decreet *pro tanto*. (*a*)

6. A Possessory Action is competent for the Teind in kind, or *ipsa corpora*. If the Teind-master hath neglected to draw his Teind for several years; and there be neither Tack nor use of payment to clear the Value: the Lords make the fifth part of the Rent the Standart. Allowing the Titular to require the fifth part for his bygone Tithes, and the Heretor to Exoner himself of his Obligation to the Titular by offering that proportion of his Rent. But yet the Heretor cannot hinder by such an offer the Titular to draw his Teind: and therefore he should not be liable to give him the fifth of his Rent when he neglects to draw. The Liquidation of bygone Teinds, according to the fifth part of the Rent is a clear and easy method, when the Parsonage and Vicarage belong to one Titular. But when these are in different hands, they must be severally Libelled and Valued, conform to the Acts of Parliament. The Parsonage Tithe being only due out of the Crop, the Libel must be particular as to what was sown, or the Quantity of the Crop, according to Proofing and Delivery by Taskers or Servants. (*b*) A Summonds for Vicarage should mention all the particular Subjects out of which it is payable: because

(a) *Gordon contra Garlies.* (b) *Stair Ibid. Lib.* 4. *Tit.* 24. §. 10.

Vicarage

Vicarage is not the ſame in all places; and more things are Tithable in one part than in another. (*a*) Therefore the parſon muſt prove the Quantity of the Corn-rent as the Subject of his Parſonage Tithe, and the Vicar muſt prove the value of his Vicarage by uſe of payment. (*b*) And if it cannot be inſtructed that any kind of Vicarage was formerly pay'd, none will be due. 'Tis ſo neceſſary that bygone Parſonage Tithes be liquidat with reſpect to the Annual Increaſe of Corn, that the Titular cannot claim for it, the fifth part of the whole Rent, deducing the Vicarage Duty; altho the Vicarage be already valued. For if the Vicarage be valued; and ſince the Valuation the Heretors Rent is improven by Graſs-rooms; the Vicar himſelf who has a far more Natural Right, would get no Benefit by the improven Rent, but behov'd to content himſelf with his valued Duty. It is Nonſenſe to ſay that the Heretor hath no prejudice by paying the fifth part of his Rent, deducing the Vicarage Duty, ſince the fifth of the conſtant Rent is the legal Right of Parſonage and Vicarage Tithe valued jointly with the Stock. For yes, the Defenders prejudice by ſuch a Practice is manifeſt, ſince it deprives him of that eaſe acquired by the Valuation of his Vicarage Tithes. 2. To give one who has but Right to the Parſonage, the 5. part of the Heretors Rent, deducing the Vicarage

(a) *Ibid.* §. 11. (b) *June* 30. 1668. *Miniſter of Elgin contra his Pariſhioners.*

Duty,

Duty, when the Subject of Vicarage is amplified; is to Subject the Heretor againſt all Law i'the World, to the payment of a double Tithe out of the ſame Subject, the one to the Vicar, and the other to the Parſon. 3. If for liquidating the bygones of Parſonage Tithes, the whole Rent ſhould be reckon'd, deducing only the Vicarage Duty, and ſo the Parſon get the Benefit of the Heretors improvement by Graſs-rooms; albeit he had no Title to any Tithe out of that Subject: then by the ſame Parity of Reaſon the Tables being turn'd, and the caſe ſtated of an Heretor who had obtained his Parſonage Tithe, valued at the time when little of his Ground was Laboured; and long after improved his Rent by Tilling and Sowing: the Titular of the Vicarage might require the fifth part of the whole Improven Rent, deducing the old Parſonage Duty. The liquid price of bygone Teind-bolls is the Sheriff-fiars. (*a*)

7. A Spuilzie is the taking away, or meddling with Moveables in anothers Poſſeſſion without the Perſons Conſent or Order of Law. Which the Committer is bound to Reſtore *cum omni cauſa*; and with the Violent Profits, that is ſuch as the Injured Party might poſſibly have made thereof, to be eſtimate by his Oath *in litem* according to *pretium affectionis*. So that it differs from wrongous Intromiſſion, which is but a general Action com-

(a) 14 *July* 1704. *Bothwel of Glencorſe contra Porterfield of Commiſtoun and his Tenents.*

petent

petent for recovery of Goods to the Owner, when he wants a more ſpecial Title to call the Poſſeſſor in queſtion, againſt whom the Concluſion is only to make him lyable to Reſtore the thing with the natural Fruits on't, at leaſt in ſo far as he was *lucratus* thereby if *bona fide* Poſſeſſor; together with Dammages when the Poſſeſſion is fraudulent. An Action for wrongous Intromiſſion with Teinds, was ſuſtained againſt one who had a Warrand from the Commiſſion-court for what he did, Impowering him to Intromet upon finding Caution to pay the Quantity the Teinds ſhould be valued at; and notwithſtanding the Teinds were valued, and the Valuation approven by the Commiſſion, without reſpect thereto, the Defender was Decerned according to the Prices and Quantity proven. In regard the Purſuer had not ſubmitted, and ſo could not be tied by the Act of Commiſſion; and the Defender ſought that Warrand upon his own Peril and Hazard. (*a*)

8. A Spuilzie of Teinds is competent when the Teind-maſter who drew the Teind the year immediately preceeding, or us'd Inhibition, is either debarred by Force, or diſappointed by anothers having Intrometted with the ſame. (*b*) There is place for a Spuilzie in Parſonage-Tithes, altho the Teind-maſter was not hindered to draw the Teind,

(a) *July* 31. 1632. *Douglaſs contra L. Ednem.* (b) *Stair Inſtit. Lib.* 2. *Tit.* 8. §. 23. *lib.* 4. *tit.* 24. §. 2.

if

if he was in immediate Poſſeſſion; and the Poſſeſſor did not ſeparate the Tithe from the Stock, and preſerve it in the terms of the Act of Parliament. (*a*) But a Spuilzie of Vicarage is no otherwiſe competent, than if the Teindmaſter was both immediately in Poſſeſſion of Drawing thereof, and debarr'd by the Poſſeſſor or other Intromettor. (*b*) A Spuilzie is not infer'd by Intromiſſion with Rentaled or Valued Teind. (*c*) Nor yet by meddling with any Teind, if the Tithe-maſter was not in Poſſeſſion of drawing Teind the former year. In which caſe he cannot claim violent Profits, but only the accuſtomed Duty till Interruption by Citation or Inhibition. (*d*) 'Tis no relevant Exception againſt a Spuilzie of Teinds at his inſtance who acted as Teind-maſter for a preceeding Crop, that the laſt years Teinding cannot be called poſſeſſion of the preſent Teind; And the Maxim *Spoliatus ante omnia reſtituendus* holds only where there is *Spolium ejuſdem corporis.* For this Alleadgeance was proponed and Repelled in the caſe of the Lady *Rentoun* againſt her Son. (*e*) And he who is in poſſeſſion of the Tithes of a part of Land, by virtue of a Title to the whole, may purſue a Spuilzie of the Teinds of the whole: For poſſeſſion of a part, in this caſe, induces poſſeſſion of the whole. (*f*) Tenents who pay a

(a) *Act* 9. *Par.* 22. *Ja.* 6. (b) *Stair ibid.* §. 12. (c) 23 *March* 1622. *Gordon contra L. Garlies.* (d) *January* 19. 1669. *E. of Athol contra Robertſon of Strowan.* (e) *July* 7, 1629. (f) *Balfour Prat.*

joint-

joint-Duty for Stock and Teind, intromettng with the Teinds after Inhibition ſerv'd, the prices muſt be proven by Witneſſes, and not by the Purſuers Oath as in Spuilzies. (a) Nor yet can the *Juramentum in litem*, be obtruded againſt any Heretor for ſimply meddling after Inhibition with the whole Growth of Lands in his own natural poſſeſſion without ſeparating the Teind from the Stock: altho in that caſe he is liable for a Spuilzie of Teinds; that is for the true Value of them, without regard to what was uſually payed before Inhibition. But if the poſſeſſor ſhould Forcibly hinder the Tithe-maſter from drawing the Teind, by virtue of a Decreet upon the back of an Inhibition: he behov'd to ſubmit to the Teind-maſters Oath *in litem*. As the Teind-maſter behov'd to give way to his Oath, for violently drawing the Teind after Inhibition without a judicial Sentence. (b)

9. The proper Defences in Actions of Tithes may be founded, 1. Upon a progreſs of Infeftments in the Lands, *cum Decimis incluſis nunquam antea ſeparatis*, which ſecures the Heretor from payment: unleſs it can be made appear that the Stock and Tithe were once ſeparate. (c) 2. Upon a legal priviledge of Exemption from payment: ſuch as is competent to Miniſters Glebes by Act of

(a) *Ibid.* (b) *January* 27. 1665. *Lairds of Beirford and Beinſtoun againſt Lord Kingſtoun.* (c) *Stair Inſtit. Lib.* 2. *Tit.* 8. §. 10.

Parliament;

Parliament ; (a) And in the days of Yore was Indulg'd to the Lands of Hoſpitalers, Templars, and Ciſtercians ; and once was Decided with us in Favours of thoſe who have Right to Ciſtercian Lands. (b) 3. The negative Preſcription is a good Defence in Actions for Vicarage : (c) And alſo for Parſonage Teind-duties preceeding fourty Years. (d) 4. Seven years quiet poſſeſſion either by vertue of an Infeftment in Tithes, (e) or of a Tack, (f) affords the Defence of a Poſſeſſory Judgement.

10. Pleas concerning points of Right, ariſing from Decreets of the Commiſſion, are competent before the Lords of Seſſion. So, they Decern for payment of bygone valued Duties, conform to Decreets of Valuation. But they do not regard theſe as a Rule for years preceeding the Valuation : For ſuch Decreets cannot be draw'n back, Becauſe they run thus, *Decerns and Declares*, &c. *to be the true yearly worth of ſuch Teinds in all time coming.* And farther, Tithes are valued according to the preſent Rent, which may vaſtly differ from that of bygone years. If there has been a Decreet of Valuation, and the ſame is loſt, it may be queſtion'd whether the Tenour can be made up and proven ? *Ratio Dubitandi*, Decreets and judicial Deeds pro-

(a) *Act* 62. *Par.* 5. *Act* 10. *Par.* 23: *Ja.* 6. (b) *July* 15. 1664. *Crawford againſt L. of Preſtoungrange.* (c) *Vid. ſupra. Chap.* 6 *Sect.* 5. *N.* 12 (d) *Ibid. N.* 9. (e) *Ibid. N.* 3. (f) *Ibid. N.* 4. *&c.*

ceed,

ceed, and the Validity of 'em depend upon ſeveral Formalities that Witneſſes are neither ſuppos'd to know, nor allowed to prove. And for that ſame Reaſon the Tenure of Letters of Horning, Executions and Indorſations thereof are not admitted to be proven by the Lubrick Teſtimony of Witneſſes. (*a*) For it is not enough that Witneſſes may remember that there was ſuch a Decreet; ſince they cannot be poſitive, at leaſt ought not to truſted if the ſame was formal. 2. If the Tenure of Decreets were allowed to be made up, how eaſily might an Extract be pretended of one that never was, and be ſhewed to ſeveral perſons, and perhaps a Copie on't be taken. Upon which the Tenure by a Proceſs may be offer'd to be made up: whereby the way would be pav'd to Fraud and Forgery. But yet in the caſe of Mr. *George Douglaſs* againſt the Heretors of *Birſe*. (*b*) The Lords admitted the Tenure of a Decreet of Prorogation of a Tack of Teinds by the Commiſſion of Plat to be proven. It is true to admit eaſily and promiſcuouſly the Tenures of Decreets to be proven, might expoſe the Securities of the Nation, by making up of falſe or null Deeds that way: And on the other hand to allow no Remedy where Writs are Deſtroyed by ſudden Accidents is againſt all Reaſon. Therefore in proving Tenures of Decreets, the Libel is not ſuſtained untill Parties are heard, both as to

(a) *Act* 94. *Par.* 6. *Ja.* 6. (b) *December* 1704.

the

the Cauſes *Amiſſionis*, and pregnancy of Adminicles; whereas in other caſes they ar allowed to prove as they beſt can. 2. As to the Objection againſt proving the Tenure of judicial Writs, *viz.* that theſe contain Solemnities by Omiſſion whereof the Deed is intirely null: It is certain that even Bonds and Diſpoſitions require Solemnities, ſuch as the Deſignation of Writers Name and Witneſſes. And Seaſines conſiſt of many Solemn Eſſential Circumſtances; and yet Declarators for proving the Tenure of theſe Writs have been often ſuſtained. Now judicial A&s are no leſs liable to Accidents than other Writs; which is the only Cauſe for allowing to make up Tenures. So that tho for preventing Forgery, the Lords require more pregnant Cauſes *Amiſſionis*, and written Adminicles in a Proceſs for making up the Tenure of a Decreet: the proving thereof can by no Law be ſimply refus'd. It is true that hath been ſometimes done, but moſtly in the Decreets of Appryſing, which are odious Diligences, and the leſs Authentick, as being led before Meſſengers, Sherffs in that part, and compos'd of the Meſſengers Execution, and Atteſtation of a Nottar. And yet a purſute for making up the Tenure of a Compryſing was ſuſtained, where the Adminicles were very pregnant, and the Executions extant and intire. (*a*) Therefore when the

(a) *Dirleton Deciſ.* 24 *June* 1675, *Birnie contra Montgomerie.*

Cauſes

Cauſes *Amiſſionis* of a Decreet is pregnantly inſtructed, and the Adminicles remove all Suſpicion of the never Exiſtence of the Writ; *quæ in eſſe debent in eſſe præſumuntur.* As to the *Act* 94. *Par.* 6. *Ja.* 6. Diſcharging Proceſſes for proving the Tenure of Letters of Horning, Executions, and Indorſations thereof; the ſame concerns a ſpecial caſe of the Executions of Letters of Horning and Denunciation never judicially produced. In a purſute for a fifth part of the Rent as the value of bygone Teinds, and for the *ipſa corpora* thereafter, a Defence was ſuſtained upon a Decreet of Valuation, to reſtrict the Claim to the valued Bolls thereincontained. Albeit the Decreet it ſelf was not produced: but only a Decreet at the Purſuers Authors Inſtance for payment of the bygones of the valued Duty, narrating and founded upon the Decreet of Valuation. Which Decreet for the valued Duty was produced and made uſe of by the Purſuer for ſupporting his Title. (*a*)

11. Payment of the Price of Tithes in a Decreet of Sale may be purſued before the Seſſion. And albeit by Act of the Commiſſion. (*b*) The price of Tithes ſhould be payed at *Whitſunday* preceeding the Crop, with Annualrent from that Term: The Lords of Seſſion found that a Decreet of the Commiſſion, Ordaining the Titular to ſell Teinds upon payment of a certain price, did not debar him from

(a) 14 *July* 1702. *Bothwel of Glencorſe againſt Porterfield of Comiſtoun and his Tenents.* (b) 30 *November* 1631.

these Teinds till the price was payed, or offer'd and consign'd upon refusal; and that he was not bound to Accept the Annualrent thereof in satisfaction of the Teind. (*a*) A Sale of Tithes can only be pursued upon the Act of Parliament before the Commission. But the Lords of Session sustain'd themselves Judges in a Proces upon a promise to sell Tithes, and Ordained them to be Sold at Nine Years Purchase; and referr'd to one of their Number, to Calculat and Determine the Price. (*b*) And perhaps it were the Nations Interest, that all Proces for Valuing and Selling of Tithes were competent before the Session.

(*a*) 24 *February* 1669. *E. of Kincardin against Laird of Rosyth.* (*b*) *February* 1682. *Craufurd of Ardmillan against the Lord Bargany.*

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